Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1998

ABF FREIGHT SYSTEM, INC.,
Petitioner

v.

RICK WEBB

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), this Court held that, in a so-called "hybrid" Section 301/duty of fair representation case in which a discharged employee establishes both that the employer has breached the collective bargaining agreement and that the union has breached its duty to represent the employee fairly, damages must be apportioned between the employer and the union. The Court declined to rule, however, on the appropriate method for apportioning damages. This case presents the issue left open in *Bowen*.

The questions presented are:

1. Whether, where a union processes a discharged employee's grievance through the grievance procedure, but breaches its duty of fair representation during a hearing on the grievance, damages should be apportioned between the employer and the union based on the date of the grievance committee's decision.

2. Whether, where a union processes a discharged employee's grievance through the grievance procedure, but breaches its duty of fair representation during a hearing on the grievance, the trial court at minimum should instruct the jury that apportioning damages based on the date of the grievance committee's decision is permissible.

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, Petitioner ABF Freight System, Inc. states that it is a wholly-owned subsidiary of Arkansas Best Corporation. Petitioner further states that its only subsidiary is ABF Freight System (B.C.), Ltd.

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PETITION FOR A WRIT OF CERTIORARI

ABF Freight System, Inc. ("ABF," "the Company," or "Petitioner"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, 1a-35a) is reported at 155 F.3d 1230. The underlying decisions of the district court are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. On November 20, 1998, Justice Breyer entered an order extending the time within which to file a petition for a writ of certiorari to and including January 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 provides:

> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185.

STATEMENT OF THE CASE

A. Factual Background

ABF is a trucking company headquartered in Fort Smith, Arkansas. ABF has terminals located throughout the United States. Until his discharge, ABF employed Rick Webb ("Webb") as a truck driver at its terminal in Fort Collins, Colorado. Webb was a member of Teamsters Local Union No. 17 ("the Union" or "Local 17"), the collective bargaining representative for the drivers and warehousemen at the Fort Collins terminal. Webb was also the Union shop steward at that terminal. (App. A at 3a.) As shop steward, Webb handled grievances for the Fort Collins employees, including a grievance concerning the allocation of work between ABF's Fort Collins

and Denver terminals. The work allocation grievance exacerbated ongoing tensions between Webb and Local 17's leadership, including the president of the Union, Ron Schwab, whose political base was in Denver. *Id.*[1]

Webb's employment was governed by the National Master Freight Agreement ("NMFA"), a multiemployer collective bargaining agreement covering more than 100,000 Teamsters working in the freight industry. Article 16, Section 3 of that agreement required employees to report any accident immediately, and provided for disciplinary action for failure to comply. While making a delivery on July 30, 1993, Webb's truck became entangled in some overhanging tree branches, which lodged between the cab and the trailer. Eventually, the branches snapped off, and Webb pulled them from between the cab and the trailer. Webb then finished his deliveries and returned to the Fort Collins terminal. (App. A at 4a.) Webb did not report the accident as required by the NMFA.

After Webb left the terminal, the terminal manager, Bill Higley, noticed damage to Webb's truck, including a bent exhaust stack and a crushed corner on the trailer. Higley took pictures of the damage and reported the incident to ABF's safety department in Fort Smith, Arkansas, and to ABF's regional vice president, Sid Hatfield, in Salt Lake City, Utah. Hatfield told Higley that failure to report an accident was a dischargeable offense. (App. A at 4a-5a.)

When Webb returned to the terminal on Monday, August 2, 1993, Higley confronted Webb about the damage to the truck. Webb provided a written statement describing the incident, and said that he had not noticed any damage to the truck. Higley then discharged Webb

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[1] After Webb successfully won a grievance involving the allocation of work between the two terminals, Local 17 negotiated a side letter that overturned the results of the grievance decision, and did so without any input or involvement by Webb or any other Fort Collins-based employee. (App. A at 3a.)

for failure to report an accident. (App. A at 5a.) Webb immediately contacted Ron Schwab and requested that the Union contest his discharge. Two days later, on August 4, 1993, Schwab presented Webb's grievance to the Colorado-Wyoming Longline Grievance Committee in Denver, the first step in the contractual grievance process. (App. A at 6a.) This hearing resulted in a deadlock, and Webb's grievance was processed to the next step of the grievance procedure, the Joint Western Area Committee ("JWAC"). The JWAC heard the grievance on August 10, 1993 in San Diego, California. Schwab apparently told Webb that it was unnecessary for Webb to attend the hearing. (App. A at 7a-8a.) At the hearing in San Diego, however, the Union president stated that Webb had been invited to the hearing, but had decided not to appear to testify in his own behalf. At the conclusion of the hearing, the JWAC denied Local 17's grievance and upheld the discharge.[2] (App. A at 8a.) The JWAC's decision was final and binding on the parties.

B. Proceedings in the District Court

In January 1994, Webb filed a hybrid Section 301 breach of contract/breach of the duty of fair representation action in the United States District Court for the District of Colorado. Webb alleged that his discharge violated the collective bargaining agreement and that the Union had breached its duty of fair representation in presenting his grievance. Webb later voluntarily dismissed his claims against the Union pursuant to Fed. R. Civ. P. 41(a)(1). Thereafter, ABF moved to join the Union as a defendant, and the court granted the motion. Webb eventually reached a settlement with the Union (one which required no monetary payment by Local 17) and moved

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[2] The JWAC, like the Colorado-Wyoming Longline Grievance Committee, was composed of an equal number of union and employer representatives, none of whom was a representative of ABF or Local 17. If the case had deadlocked at the JWAC, it would have proceeded to arbitration.

to dismiss his claims against the Union with prejudice. ABF opposed this dismissal, but the court granted it. The case then went to trial with ABF as the sole defendant.

At trial, Webb presented evidence that Schwab failed to obtain Company documents that Webb believed would help his case, failed to interview one of Webb's co-workers, failed to call any witnesses during the hearings, failed to review the Company's evidence prior to the hearings, disparaged Webb at the JWAC hearing, and, finally, contradicted Webb's account of the tree-skimming incident. Webb also showed that Schwab "affirmatively misled" him regarding the need to appear at the hearing in San Diego, and that Schwab then told the JWAC members that he did not know why Webb had chosen not to appear. Schwab used Webb's purported decision not to appear as an explanation for Schwab's inability to address adequately the JWAC members' questions. Webb also presented evidence to show that he simply skimmed the trees, and that such an incident was not a reportable accident. He also argued that the Union had refused to present his claim that his discharge was in retaliation for his activity as a shop steward, despite his explicit request that it do so. (*See* App. A at 16a n.14.)

At the close of the trial, ABF requested that the court instruct the jury that it must apportion Webb's back pay damages between the Company and the Union according to the date of the JWAC hearing. ABF argued that, had the Union not breached its duty to Webb, he would have been reinstated as of that date, at the latest. The court rejected this instruction. ABF then requested that the court instruct the jury as follows on the proper apportionment of damages:

> You must separate from Rick Webb's damages the portion of those damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight System, Inc. from the increase in those damages caused by Teamsters Local Union No.

> 17's failure to fairly represent Rick Webb. You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident.

(App. C at 37a.) The court likewise rejected this instruction. Instead, the court simply instructed the jury generally that:

> You must apportion any award of damages between the employer and the union according to the damages caused by the fault of each. Damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight System, Inc. should not be charged to Teamsters Local Union No. 17, and increases in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb should not be charged to the employer. The combined amount of these damages should make Rick Webb whole.

(App. B at 36a.)

The jury returned a verdict in favor of Webb and awarded him compensatory damages totaling $112,124. Although—had the Union not breached its duty—Webb would have been reinstated no later than two weeks after his discharge, the jury apportioned 80 percent of the award, or $89,699.20, against ABF, and a mere 20 percent, or $22,424.80, against the Union. ABF moved for judgment as a matter of law or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 50. The district court denied the motion, and ABF appealed.

C. Decision of the Court of Appeals

The court of appeals affirmed, and held that the jury had been instructed properly. The court rejected ABF's argument that its liability should have been limited as a matter of law to back pay and benefits that had accrued before the JWAC hearing. The court also rejected ABF's

alternative argument that the district court at a minimum should have instructed the jury that apportionment based on the JWAC hearing date was permissible. The court reasoned that, under this Court's precedents, an employee need only prove that the discharge violated the collective bargaining agreement and that the union's breach of duty "seriously undermine[d] the integrity of the arbitral process." (App. A at 27a) (*quoting Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976)). In light of this standard, the court held, it was "logically possible for a jury to assess damages against an employer based on proportionate fault that includes damages incurred after the date of the flawed grievance hearing." (App. A. at 27a.) The court asserted that such an allocation would ensure that the "primary wrongdoer" bore an appropriate portion of the damages, "especially when an allocation of damages based on the grievance arbitration date would shift a disproportionate amount of damages onto the party that was less at fault." (App. A. at 27a.) In so holding, the court of appeals relied only on this Court's decision in *Hines*, which did not concern the apportionment of damages, and on its own decision in *Aguinaga v. United Food & Commercial Workers International Union*, 993 F.2d 1463 (10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994). The court did not even cite this Court's decision in *Bowen*, and did not address the significance of a union's breach of the duty of fair representation in undermining the collectively bargained dispute resolution procedures.

REASONS FOR GRANTING THE PETITION

This case presents an issue of great importance to the predictability and finality of negotiated grievance procedures, which this Court repeatedly has recognized as vital in administering collective bargaining agreements. Although this Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), established the "governing principle" that unions and employers are each responsible in hybrid Section 301/DFR suits for the damages that they caused, lower courts have

misconstrued that ruling and have experienced significant difficulty in attempting to allocate damages between the parties.[3] In *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), this Court recognized that permitting a union to escape liability for increases in damages caused by the union's breach of the duty of fair representation deprived employers of their ability to rely on the finality of contractual grievance procedures, and also reduced the incentives for unions to process all grievances fairly. Accordingly, the *Bowen* Court emphasized that the apportionment rule of *Vaca* applied to damages for back pay and benefits. In *Bowen*, the trial court had apportioned the damages according to the date of a "hypothetical" arbitration that would have taken place had the union not breached its duty of fair representation. As the case came to this Court, however, the issue of the proper method of apportionment was not presented, and this Court expressly declined to decide what that method should be. This case squarely presents that issue.

The Tenth Circuit's decision runs counter to this Court's repeated statements that increases in damages attributable to a union's breach of the duty of fair representation may not be charged to the employer. Had the Union met its responsibility to Webb, he would have been reinstated within two weeks, and ABF would have been liable for

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[3] Difficulty in determining the proper method for allocating damages for breaches of the duty of fair representation is not confined solely to the courts, but also has plagued the National Labor Relations Board. *See Iron Workers Local Union 377*, 326 N.L.R.B. No. 54 (1998); *Rubber Workers Local 250, (Mack-Wayne Closures)*, 290 N.L.R.B. 817 (1988). The Board's recent decision in *Iron Workers Local Union 377*, for example, elicited three separate views among the five Board members on the appropriate method for awarding damages in a DFR context. Members Fox and Liebman favored a "reasonable under the circumstances" approach, then-Chairman Gould advocated a "percentage of fault" standard, and Members Hurtgen and Brame opined that the union should be responsible for making the employee whole in DFR cases handled by the Board under Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A).

approximately $1,280 in back pay damages. Although the court of appeals' analysis correctly began from the premise that the union must bear the liability for increases in the amount of back pay damages caused by its breach of the duty of fair representation, the court essentially abandoned that fundamental premise in affirming the allocation here. Despite concluding that it was reasonable for the jury to infer "that Local 17 deliberately attempted to submarine Webb's case," the court of appeals permitted the jury to assign the overwhelming share of liability to ABF. (App. A at 21a.) As a result, ABF was held liable for more than $89,000 in back pay, or 70 times its liability in the absence of union malfeasance. This Court should review the decision of the court of appeals to provide guidance to the lower courts and to ensure that lower courts properly implement the holding in *Bowen.*

In the fifteen years since *Bowen,* the Tenth Circuit is the only court of appeals to have apportioned damages in a hybrid Section 301/breach of duty case using a "percentage of fault" method. The overwhelming majority of courts that have discussed the proper method of apportionment have done so in factual contexts where the union did not process the grievance to the point where a final and binding award issued. In such cases, the courts have stated the general rule that the union is responsible for those back pay damages accruing after the date of a hypothetical grievance hearing that would have taken place had the union not breached its duty of fair representation. This case presents an especially compelling argument for apportionment of back pay damages based on the hearing date because here the breach occurred in large part at the actual grievance hearing. Thus, the lower courts had a date certain when Webb would have been reinstated had the Union not breached its duty. Since the Union's breach of its duty was the cause of the damages that accrued after the JWAC's decision, the court of appeals' rejection of the decision date method unjustifiably shifts responsibility for those damages from the union to the employer

and significantly reduces union incentives to process all grievances fairly. Moreover, allocating a disproportionate amount of back pay liability to employers unfairly punishes employers who justifiably rely upon the integrity and finality of the contractually agreed-upon grievance system. That becomes especially apparent in the circumstances of this case, where the Union was first voluntarily dismissed from the action by Webb, and, when rejoined as a defendant by ABF, settled with Webb without the payment of any monetary damages.[4] Thus, the very fear of settlements by unions "in exchange for the employee's undertaking to look to his employer for his entire recovery" became a reality in this case. *See Bowen,* 459 U.S. at 226 n.15.

In addition, the court of appeals' decision erodes this Court's careful balancing of the interests of unions, employers, and employees that has been the driving force behind the Court's jurisprudence in the labor-managment context. The decision skews that balance, and unfairly shifts liability from unions to employers. This Court should make clear that an employer who relies in good faith on the finality of a contractually specified grievance procedure will be protected against the consequences of union malfeasance. In the absence of review by this Court, employers will be unable to rely on final grievance and arbitration decisions in ordering their relations with employees and their unions, and could be held liable not only for the damages resulting from their own conduct, but those attributable to the union's conduct as well. By granting review, this Court will enhance the stability of labor-management relations, further proper union representation of employees, and at the same time protect the interests of employees in full compensation.

For all of these reasons, which are explained more fully below, the Court should grant review to rectify the errors

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[4] Webb then moved to dismiss Local 17 as a defendant, a motion that the district court granted over ABF's objection.

of the court of appeals and establish that, where the union's breach of duty causes the failure of the grievance process, employers may not be held liable for back pay damages accruing after the date of the grievance committee's decision. In the alternative, the Court should establish that employers at minimum are entitled to have the jury instructed on the significance of the date of the decision in determining the proper allocation of damages.

I. REVIEW SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENTS.

a. An employee who alleges he was discharged in violation of a collective bargaining agreement generally must avail himself of the collectively-bargained grievance procedures rather than suing his employer for breach of contract. Any decision resulting from recourse to those grievance procedures is normally final and not subject to review in court. *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965). Only when a union's breach of its duty of fair representation in processing the employee's grievance "seriously undermines the integrity" of the grievance process is the finality bar lifted and the employee permitted to sue. If the employee then proves that his discharge was wrongful, he is entitled to an appropriate remedy against both his employer and his union. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967).

Beginning with *Vaca*, this Court repeatedly has held that an employee's damages in hybrid Section 301/DFR cases must be apportioned between the employer and the union. *Vaca* held first that suits for breach of the duty of fair representation are not within the exclusive jurisdiction of the NLRB. The Court ruled that an employee could bring a breach of contract suit against his employer despite his failure to exhaust his contractual remedies, provided that he could demonstrate that the union had breached its duty to him in not pursuing his grievance.

386 U.S. at 186.[5] A court considering such a suit logically would need to determine whether the union had breached its duty and, unless the court had jurisdiction over the union, it would be unable to formulate appropriate remedies:

> Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury.

Id. at 187. In a footnote, the Court reiterated that courts should award damages against *both* the employer and the union where the union had contributed to those damages. 386 U.S. at 188 n.12.

Having concluded that the courts had jurisdiction over the claim against the union, the Court held that the union had not breached its duty of fair representation. 386 U.S. at 193. The Court then held that the jury's damage award against the union could not stand for another reason as well. The jury had awarded the employee the full amount of his back pay damages suffered as a result of his wrongful discharge, and the Court held that an award against a union could not "include, as it did here, damages attributable solely to the employer's breach of contract . . . ." *Id.* at 197. The Court saw "no merit in re-

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[5] The Court based its decision on the close links between duty of fair representation actions and breach of contract suits against employers, reasoning that, since a wrongfully discharged employee generally must exhaust the contractual grievance procedures before bringing a breach of contract suit against the employer, a union's breach of its duty in failing to process the grievance could deprive an employee of all remedies.

quiring the union to pay the employer's share of the damages." *Id.* Instead, the Court announced the general rule for apportioning damages between unions and employers:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

Id. at 197-98. The *Vaca* Court clearly recognized that employers and unions should be held responsible for the damages each caused through the wrongful discharge and the breach of the duty of fair representation.

Vaca involved a straight duty of fair representation claim based on a union's failure to arbitrate a grievance. In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the Court had before it a hybrid Section 301/DFR suit, which involved a union breach of its duty in processing a wrongful discharge grievance, including, as in this case, the presentation of the case before a joint committee of employer and Teamsters Union representatives. The issue before the Court was whether the committee's decision was entitled to finality or whether it could be challenged in court. Again, the Court acknowledged the importance of determining whether the union had breached its duty of fair representation, and held that, if it had, then the finality bar was removed. Although the Court did not have before it the question of the proper apportionment of damages, Justice Stewart, in his concurring opinion, described the proper application of the principles set forth in *Vaca*. Justice Stewart explained that *Vaca* required that the union be charged with the back pay that accrued after the date of the joint committee hearing and decision because the employer had done nothing wrong in relying on the finality

of the committee's award. *Hines*, 424 U.S. at 572-73 (Stewart, J., concurring). According to Justice Stewart:

> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. ***Liability for the intervening wage loss must fall not on the employer but on the union.*** Such an apportionment of damages is mandated by *Vaca*'s holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.

424 U.S. at 573 (Stewart, J., concurring) (emphasis added) (citation omitted).

Lower courts applying the *Vaca* apportionment rule in hybrid Section 301/DFR cases, however, often held that employers were solely liable for all back pay damages suffered by an employee, while the union could be charged only with the increased costs and attorneys' fees associated with the employee's pursuit of the claim against the employer. *See, e.g., Seymour v. Olin Corp.*, 666 F.2d 202 (5th Cir. 1982); *Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291 (1st Cir. 1978); *Milstead v. International Bhd. of Teamsters*, 580 F.2d 232 (6th Cir. 1978); *St. Clair v. International Bhd. of Teamsters*, 422 F.2d 128 (6th Cir. 1969). Other courts suggested that, if there was proof that the employee would have been reinstated in the absence of the union's breach of duty, back pay damages could be charged to the union (although these courts often concluded that such proof was lacking in the

case before them). *See, e.g., Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61*, 620 F.2d 439, 443-44 (4th Cir. 1980); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

The Fourth Circuit followed the first approach in *Bowen v. United States Postal Service*, 642 F.2d 79 (4th Cir. 1981). There, the union breached its duty of fair representation by failing to process the employee's grievance through arbitration. The district court instructed the jury that it could award back pay damages against the union and that, in apportioning such damages between the union and the Postal Service, the jury could consider the date of a hypothetical arbitration that would have taken place had the union not breached its duty. The court of appeals reversed, holding that "[a]s Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations . . . was chargeable to the Union." *Id.* at 82. This Court granted certiorari, and reversed. 459 U.S. 212 (1983).

Bowen expressly held that the *Vaca* "governing principle" required apportioning back pay damages between the employer and the union. Although the employer wrongfully discharged the employee and thus was secondarily liable for all of the employee's back pay, the union was primarily liable for that portion attributable to its breach of duty:

> It would be equally unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct. It is true that the employer discharged the employee wrongfully and remains liable for the employee's back pay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunc-

> tion resulting in an increase in the employer's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages.

459 U.S. at 223 (footnotes and citation omitted). Where a union declines to arbitrate, the employer should be "in the same position as if the employee had had the right to act on his own behalf and had done so. Indeed, if the employer could not rely on the union's decision, the grievance procedure would not provide the uniform and exclusive method for the orderly settlement of employee grievances, which the Court has recognized is essential to the national labor policy." *Id.* at 225 (brackets and internal quotation omitted). The Court emphasized the importance of final contractual grievance procedures to national labor policy and noted that, in the absence of such apportionment, the incentives to comply with the grievance procedures would be diminished and employers might reconsider their willingness to agree to traditional grievance/arbitration clauses. *Id.* at 227.

The only issue before the *Bowen* Court was whether back pay damages could be assessed against the union at all, and the Court expressly declined to review the trial court's instruction on the proper method of allocation. 459 U.S. at 230 n.19. In his separate concurring and dissenting opinion, however, Justice White characterized the Court's opinion as holding that an employer who wrongfully discharges an employee is chargeable only with the back pay that accrues "prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration," with the union liable for the remainder. *Id.* at 230 (White, J., concurring in part in the judgment and dissenting in part). Although Justice White disagreed with what he characterized as the majority's conclusion on this point,

he left open the possibility that, where—as in this case—the union did process the grievance through decision and the employer relied in good faith on that decision, the union might be responsible for back pay accruing after the date of the decision. *See id.* at 234 n.3 (White, J.) (stating that Justice Stewart's concurring opinion in *Hines* "was founded on the employer's good-faith reliance on a favorable arbitral decision. Here, the Court goes far beyond Justice Stewart and grants the employer the right to rely on a non-existent arbitration, even though the union is by no means under a duty to the employer to take any grievances to arbitration."). This case squarely presents the situation that Justice Stewart described in his *Hines* concurrence and that the Court expressly left open in *Bowen.*

b. The court of appeals' decision in this case cannot be reconciled with this Court's holdings in *Vaca* and *Bowen.* Although the court began with the *Vaca* "governing principle" of apportioning damages (App. A at 25a), it quickly lost sight of it. Moreover, it neither discussed nor even cited *Bowen.* Instead, in addressing the apportionment issue, the court focused on what it called "ABF's mistaken argument as to the causation standard in a DFR claim." (App. A at 26a.) Under *Hines,* the court emphasized, Webb could succeed on his DFR claim merely by showing that the union's conduct had "seriously undermine[d] the integrity of the arbitral process . . . ." *Hines,* 424 U.S. at 567. The court interpreted this to mean that the employee need not prove that he would have been reinstated had the union acted properly. As a consequence, the court concluded, it was "logically possible for a jury to assess damages against an employer based on proportionate fault that includes damages incurred after the date of the flawed grievance hearing." (App. A at 27a.)

The error in the court of appeals' analysis is threefold. First, the requirement that the union's breach has "seri-

ously undermined" the arbitration has nothing to do with the proper apportionment of damages, an issue not before the Court in *Hines*. Instead, that is the standard an employee must meet to overcome the finality bar normally applicable to arbitration decisions. Absent such a showing, the court may not even consider whether the employer breached the contract. Thus, the court misapplied *Hines* in concluding that it supported a "proportional fault" allocation of back pay damages that would allow the jury to apportion a greater share of the damages to the "primary wrongdoer."

Second, the court incorrectly concluded that the "substantially undermined" standard of *Hines* is inconsistent with assigning to the union the damages that would not have accrued "but for" the union's breach of duty. (App. A at 27a.) In fact, the latter is exactly what *Vaca*, *Bowen*, and Justice Stewart's concurrence in *Hines* require. There are only two possible outcomes where the union does not breach its duty at a grievance hearing: either the employee is reinstated, in which case no back pay damages accrue after the reinstatement date and the employer's exposure is limited to the back pay that accrued prior to that point; or, the employee is still not reinstated but, because there was no DFR breach, the finality bar cannot be overcome and the employer has no liability at all for back pay damages. Thus, where the union properly represents the employee, the employer's maximum liability is capped at the back pay that accrued between the discharge and the date of the reinstatement. An employer's liability should not be greater where the union breaches its duty than where the union meets its obligations. Yet, this is exactly the result that the court of appeals' decision permits. By allowing an employer's liability for back pay to be greater where the union breaches its duty than where it does not, the court of appeals permits the union to shift the damages caused by its breach onto the employer and penalizes the employer for the union's fault. The court of appeals' deci-

sion thus directly contravenes the *Vaca* and *Bowen* "governing principle" of allocating to the employer and union respectively the damages "caused by the fault of each."

Third, the court's analysis bootstraps the very proposition to be established. Simply put, it is immaterial whether it is "logically possible" for the jury to have apportioned the damages as it did if it was legally impermissible for it to have done so. *Vaca* and *Bowen* and Justice Stewart's concurrence in *Hines* all make clear that it is the union that must bear the cost of the increased damages attributable to its breach of duty. Where, as here, the employer relied on the collectively bargained dispute resolution process but the union breached its duty in handling the grievance, the increased damages are those that accrued after the decision that otherwise would have reinstated the employee.

Not only does *Hines* not support the court of appeals' decision, but neither does the only other case on which the Tenth Circuit relied, its own decision in *Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1463 (10th Cir. 1993). The district court's opinion in *Aguinaga* makes clear that that case does not support the result reached here. 720 F. Supp. 862 (D. Kans. 1989). In *Aguinaga*, the employer shut down a meatpacking plant in June 1982 and improperly reopened it in March 1983 as a non-union plant. After the jury returned a verdict for the plaintiffs, the district court addressed the proper apportionment of damages. *Id.* at 870. The court determined that it would award damages only for the period between June 1982 and September 1, 1983, which was the first possible acceptable closure date under the terms of the collective bargaining agreement. *Id.* at 873. The court concluded it could not rely on the hypothetical arbitration date method of allocation primarily because it would require the court "to engage in considerable guesswork in arriving at the dates when the various stages of the grievance procedure would have been completed had

they been initiated by the union." *Id.* at 870. Accordingly, although the court candidly acknowledged that it had found no authority for the percentage fault approach, the court charged the employer with 75% and the union with 25% of the back pay damages. The court stressed, however, that this approach was "consistent with both the hypothetical time frame of an arbitration decision and the duration provision of the [contract]." *Id.*

On appeal, the Tenth Circuit held that the percentage fault method satisfied the *Vaca* principle that the union be held responsible for any increases in the employees' damages caused solely by the union's breach: "Of this we are convinced because the court specified that its apportionment took into account the time frames of both a hypothetical arbitration date and the 1979 Master Agreement. Accounting for these time frames implies that the court properly considered the Union's responsibility for delaying Plaintiffs' remedy." 993 F.2d at 1476. Similarly, the court of appeals rejected the plaintiffs' claim that the apportionment was arbitrary, because the district court had found the apportionment "most consistent with the hypothetical time frame of an arbitration decision and the duration provision of the 1979 Master Agreement." *Id.* at 1477. Thus, while the court affirmed the use of the proportional fault method, the result of that method there was closely tied to—if not identical to—the result of the hypothetical arbitration date method.

In sharp contrast to *Aguinaga,* however, there was no need whatsoever for the court in this case to engage in "guesswork" as to when the grievance procedures would have been completed. Here, the union did process the grievance to decision, and that decision was entered on a date certain. Similarly, to the same degree that the apportionment in *Aguinaga* was not arbitrary because it "took into account" the time of a hypothetical arbitration, the apportionment here *is* arbitrary because it bears no relationship whatsoever to the date of the decision. This is

especially frustrating here because, in refusing even to instruct the jury that it could consider the arbitration date, the trial court deprived the jury of *any* rational basis for allocating the back pay damages in this case. Although application of the percentage fault method of apportionment in *Aguinaga* may have allowed the court to avoid "speculating" as to the likely date of a hypothetical arbitration while still producing a damage award that closely approximated the arbitration date method, the use of the percentage fault method here resulted in the employer being assessed more than 70 times the liability it would have borne under the arbitration date method, and allowed Local 17 to escape responsibility altogether for the damages that it caused. This result flies in the face of the rule announced in *Vaca* and emphasized in *Bowen*, and should not be allowed to stand.[6]

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER METHOD OF APPORTIONMENT.

Since this Court's decision in *Bowen*, the Tenth Circuit stands alone among the federal courts of appeals in its use of a "percentage fault" apportionment rule, as it did in this case. (App. 27a). *See Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1463

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[6] In following the percentage fault method under the circumstances of *Aguinaga*, the Tenth Circuit relied on cases in different substantive areas in which, as in Section 301/DFR litigation, federal common law applies. 993 F.2d at 1476 (*citing United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (maritime collision actions), and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (admiralty personal injury actions)). This Court cautioned in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), however, that courts should "not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process." *Id.* at 172 (citation omitted).

(10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994).[7] The majority of courts, in contrast, properly have taken their cue from *Bowen*, and have stated that back pay should be apportioned based on the date the grievance would have been arbitrated, had the union not breached its duty.[8] *See Colon Velez v. Puerto Rico Marine Management, Inc.*, 693 F. Supp., 1335, 1344 (D.P.R. 1988) ("When the Union's breach of duty arises from its failure to pursue an employee's grievance, the Court is justified in holding the company liable for damages from the time of discharge until the date on which it would have reinstated the plaintiffs if the Union had fulfilled its duty. All damages accruing after the hypothetical reinstatement date are to be paid by the Union."), *aff'd*, 957 F.2d 933 (1st Cir.

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[7] *Aguinaga* itself was the first post-*Bowen* court of appeals decision applying a percentage fault analysis. As discussed *supra*, that case does not support the Tenth Circuit's decision here.

[8] Where the employer and union collude with each other in breaching a collective bargaining agreement and denying an employee the effective processing of a grievance, it is appropriate not to apportion damages at all, but instead to hold the union and employer jointly and severally liable. *See Bowen*, 459 U.S. at 223 n.11 (observing that "this is not a situation in which either the union or the employer has participated in the other's breach"); *Vaca*, 386 U.S. at 197 n.18 ("Since the Union played no part in Swift's alleged breach of contract and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted."); *Allen v. Allied Plant Maintenance Co. of Tennessee, Inc.*, 881 F.2d 291, 298-99 (6th Cir. 1989) ("Because this case presents the unusual situation in which an employer has participated in the union's breach of duty, we believe joint and several liability is proper."); *Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986) ("We find no error . . . in the failure to give the apportionment charge, for when a union has caused or participated in the underlying wrong of the employer, it is appropriate to hold it jointly and severally liable for the employee's loss."). In this case, there has never been any allegation that the Company and the Union conspired with each other to deprive Webb of his rights or otherwise participated in the other's wrong.

1992); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 245 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *San Francisco Web Pressmen v. NLRB*, 794 F.2d 420, 424 (9th Cir. 1986) ("The employer and union each are liable for the portion of damages that it caused: the employer for back pay from the date of the wrongful termination to the date the employee would have been reinstated had the union not breached its duty, and the union for back pay thereafter."). *Cf. Bennett v. Local No. 66, Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union*, 958 F.2d 1429 (7th Cir. 1992) (affirming joint and several liability where the union and employer had participated in each other's breach, but observing that "[t]he general rule in hybrid section 301 cases, as stated in *Vaca* . . . is that damages should be apportioned. The employer is liable for any damages preceding the time an arbitrator would have reinstated the employee, had the union done its duty.").[9]

The actual or hypothetical date of reinstatement approach used by a majority of the courts of appeals is well founded. As the Seventh Circuit observed in *Camacho*, where the case proceeds to trial solely against the employer, it becomes solely responsible for defending the union's conduct. 786 F.2d at 245. The court character-

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[9] *See also In re Aircraft Workers Alliance, Inc. and Individual Grievant*, 99 Lab. Arb. Rep. (BNA) 585, 600 (Sept. 3, 1992) ("[T]he Union will be assessed that portion of the Plaintiff's stipulated total damages that was incurred from the date of a hypothetical award in the Plaintiff's case. The time between the Plaintiff's discharge and the date of such an award is properly apportioned against the Company rather than the Union."); *Martino v. Transport Workers' Union of Philadelphia*, 480 A.2d 242, 251 (Pa. 1984) ("We are also persuaded by *Bowen* that such relief must limit the employer's liability for backpay to the period from the date of wrongful discharge to the date when arbitration would normally have commenced. In the absence of an apportionment providing meaningful sanctions against the union, incentives to comply with the grievance procedure would be diminished.").

ized this as an unsatisfactory situation, both because it may be difficult for the employer to determine why the union acted as it did, and, more importantly, because "[a] union has little incentive to cooperate with its natural adversary in the course of litigation, once the plaintiff offers it practical immunity." *Id.* As the Seventh Circuit explained, this Court's decision in *Bowen* minimized this risk "by reducing the maximum that the employer may be called on to pay an employee" to those damages sustained by the employee prior to "the time an arbitrator would have reinstated the employee, had the union done its duty." *Camacho,* 786 at 245 (citation to *Bowen* omitted).

As previously noted, the court of appeals here did not even mention *Bowen,* nor any of the risks inherent in a proportionate fault approach where only one party, the employer, is sued or remains in the litigation as the only defendant, as was the case here. *See Bowen,* 459 U.S. at 226 n.15; *Camacho,* 786 F.2d at 245. From the union's perspective, a settlement for nominal or, as occurred here, no monetary liability is obviously desirable. From the plaintiff's perspective, litigating against one defendant, as opposed to two, is generally an appealing prospect. This is especially true where the court utilizes jury instructions that permit a damage award that results in almost complete recovery from the remaining defendant, and where that defendant "must justify acts it may find inscrutable." *Id.*

The Tenth Circuit's adoption of its proportionate fault rule recently prompted one commentator to write that "[t]he method for achieving such an apportionment, however, is not always clear." John Neighbours, *et al., The Developing Labor Law* 554 (3d ed. Cum. Supp. 1998). The court's mathematical approach to the apportionment dilemma flies in the face of the overwhelming majority of courts that have spoken on the subject. It should be reversed. This is especially true because, in contrast to the

situation in *Bowen* and the lower court cases cited above, here the union *did* process the grievance to a decision. Accordingly, this case falls squarely within the scope of Justice Stewart's concurrence in *Hines*, and presents compelling reasons for the Court to revisit the question of the method of apportionment left open in *Bowen*.

III. IMPORTANT CONSIDERATIONS OF NATIONAL LABOR POLICY SUPPORT REVIEW OF THE COURT OF APPEALS' DECISION.

a. Congress expressly provided in Section 203(d) of the Labor Management Relations Act that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." 29 U.S.C. § 173(d). This Court has emphasized that this congressional policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Hines*, 424 U.S. at 562. In particular, "[c]ourts are not to usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.'" *Hines*, 424 U.S. at 562 (*quoting United Steelworkers*, 363 U.S. at 569).

Notwithstanding the importance of the finality of collectively bargained grievance and arbitration procedures, this Court traditionally has endeavored to balance the interests of employees, employers, and unions. To that end, the Court in *Vaca* and *Hines* permitted employees to sue their employers directly if the union fails to carry out its responsibilities. The Court also recognized, however, that it would be "equally unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct," and thus required the apportionment of such damages according to the fault of each. *Bowen*,

459 U.S. at 23; *Hines*, 424 U.S. at 572 (Stewart, J., concurring); *Vaca*, 386 U.S. at 197-98.

The court of appeals' decision in this case undermines this Court's balancing of interests and threatens the congressional policy favoring private settlement of labor disputes. If courts may apportion damages in a way that allocates to employers a materially greater percentage of liability than if the union had not breached its duty, then employers will not be "in substantially the same position as if the employee had had the right to act on his own behalf and had done so." *Bowen*, 459 U.S. at 226. Nor will employers be able to rely on the finality and exclusivity of the grievance procedures so critical to national labor policy if they may be held liable for back pay damages that accrued long after the contractual grievance procedures have been completed. *See id.* Unless damages are apportioned based on the date of the decision that could have cut off an employer's back pay liability, employers will be faced with the "dubious option" of either reinstating the employee or exposing themselves to open-ended back pay liability. *Id.* at 226 n.15.

b. The court of appeals' decision also undermines the employee's right to be made whole for the injuries he suffers as a result of a wrongful discharge and union breach of duty, which this Court has characterized as "of paramount importance." *Bowen*, 459 U.S. at 222. Employees need not join both the employer and union in a hybrid Section 301/DFR action. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). As happened in this case, unions sometimes settle duty of fair representation claims or simply are not joined as a defendant. *See, e.g., Cummings v. John Morrell & Co.*, 36 F.3d 499 (6th Cir. 1994); *Camacho*, 786 F.2d at 245 ("This litigation is between Camacho and the Hotel, not between Camacho and the Union."). If the jury in the hybrid suit returns a verdict for the employee but appor-

tions a greater part of the employee's back pay damages against the union than the employee received in settlement, the employee will receive less than full compensation for his injuries. By adopting the actual or hypothetical arbitration date approach, employees will be better able to predict the allocation of liability between the union and the employer to protect their interest in a full recovery.

Similarly, the *Bowen* holding was based in part on the recognition that allowing unions to escape liability for the damages caused by their breaches of duty encourage collusive settlements, whereby the union would acknowledge a breach of duty in exchange for the employee looking solely to the employer for his recovery. 459 U.S. at 226 n.15. The decision in *Bowen* makes such collusion less likely by reducing the maximum that an employer may be forced to pay. *Camacho,* 786 F.2d at 245. The court of appeals' decision here, by contrast, counters that salutary effect of *Bowen.*

c. The apportionment rule mandated by this Court's precedents has another benefit for the proper prosecution of hybrid Section 301/DFR actions. An employee in a hybrid suit must prove both that the union breached its duty of fair representation and that the employer breached the contract, for "the two claims are inextricably interdependent." *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 66 (1981). Where the union settles the breach of duty claim before trial, the employer must defend the union's conduct by itself. This places employers in a Catch-22 situation, because, in defending the union's conduct to counter the claim of breach of the duty of fair representation, the employer risks making its own breach of contract seem worse in the eyes of the jury, thereby increasing its potential portion of the back pay award. Moreover, in the absence of the union, employers may be less able to explain union conduct. Thus, the Tenth Circuit's approach clearly does not comport with or advance

"the practicalities of hybrid § 301/fair representation litigation," an area for which this Court traditionally has demonstrated concern. *See, e.g., DelCostello,* 462 U.S. at 165 (applying same limitations period for both halves of a Section 301/DFR action). If unions are held liable for all back pay accruing after an arbitration date, then they will have an increased financial incentive to defend their own conduct vigorously and ensure that the rigorous standards for finding a breach of the duty of fair representation are met. *See Camacho,* 768 F.2d at 245; *Hoffman v. Lanza, Inc.,* 658 F.2d 519, 522 (7th Cir. 1981).

d. Finally, forcing unions to bear the full cost of the damages caused by their breach of duty will encourage unions to handle all grievances fairly and to the best of their ability. In turn, this may reduce the number of hybrid Section 301/DFR suits that are brought in the future, thereby promoting the finality of the grievance procedures and stability in labor-management relations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Sep. 4, 1998]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICK WEBB,
Plaintiff-Appellee,
v.

ABF FREIGHT SYSTEM, INC.,
a corporation,
Defendant-Appellant,

and

TEAMSTERS LOCAL UNION NO. 17,
Defendant.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 94-Z-239)

Before EBEL and HOLLOWAY, Circuit Judges, and BLACK,* District Judge.

EBEL, Circuit Judge.

This case involves a jury's verdict of $112,124 for the appellee on his claim that he was wrongfully fired from his job as a delivery truck driver on trumped up charges after his delivery truck skimmed the underside of some tree branches, and that the real reason for his discharge

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* The Honorable Bruce D. Black, District Court Judge, District of New Mexico, sitting by designation.

was retaliation for his union activities. Appellant argues that the verdict should not stand because the appellee failed to prove the elements necessary to his claims of breach of contract and breach of the duty of fair representation. The appellant also challenges numerous discretionary rulings by the district court during the course of the trial. We affirm on all grounds.

Background [1]

The dispute in this case arose in 1993, when defendant-appellant ABF Freight System, Inc. ("ABF"), fired plaintiff-appellee Rick Webb. ABF alleged that Webb had violated his contractual duty to report immediately "any accident." [2] The question in this case is whether ABF's claim was the true basis for Webb's discharge or merely a pretext for firing a union activist.

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[1] Because of the jury's verdict in favor of the appellee, our review of the evidence is presented here in the light most favorable to the appellee. *See Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1522 (10th Cir. 1997). This standard of review requires that we accept the jury's factual determinations as long as they are reasonably based on some evidence or the inferences that may reasonably be drawn from such evidence. *Id.*

[2] The relevant language from the Teamsters' national contract reads:

> Accident Reports
>
> Any employee involved in any accident or cargo spill incident, involving any hazardous or potentially polluting product, shall immediately report said accident or spill incident and any physical injury sustained. When required by his Employer, the employee, before starting his next shift, shall make out an accident or incident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident or incident. . . . Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

National Master Freight Agreement, for the period of April 1, 1991 through March 31, 1994, art. 16, § 3.

1. Webb's union activities

Webb worked as a truck driver with ABF for more than nine years before he was fired on August 2, 1993. Webb also was a member of Teamsters Local No. 17,[3] which represents all of ABF's drivers in Colorado and elsewhere, and Webb had been the shop steward for Local 17 at ABF's Fort Collins terminal from the day the company opened its terminal there.

In his role as shop steward, Webb prosecuted grievances on behalf of himself and other drivers from Fort Collins, including grievances alleging unsafe practices by ABF. Webb also was involved with disputes with ABF management over the use of overweight trucks and a hazardous waste spill at the terminal.

During the winter of 1992-93 one of Webb's grievances involved a dispute over ABF's use of drivers from the Denver terminal to do work in Fort Collins on weekends. Webb secured a grievance award of overtime pay for one Fort Collins driver who had lost weekend work to Denver drivers. However, two weeks later, the Denver leadership of Local 17, including union president Ron Schwab, negotiated a side letter with ABF that effectively reversed the results of the grievance decision. This side letter was negotiated without input from Fort Collins' drivers, and it was adopted by the union before any Fort Collins drivers could comment on it. The dispute over work allocation between the Denver and Fort Collins terminals led to continuing friction between Webb and the Teamsters leadership in Denver, including union president Schwab, whose political support was based in the Denver terminal's drivers.

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[3] Local 17 originally was a defendant in this case, but Webb agreed to dismiss his claims against the union prior to trial. Thus, the union is not a party to this appeal.

2. Webb's firing

On the afternoon of July 30, 1993, a Friday, Webb took a full truck out for deliveries, with the first delivery at the Colorado State University Alumni Center ("CSU"). As Webb was backing up to the alumni center, Webb's truck became entangled with overhanging branches. Webb testified that these branches were no more than 1½-to 2-inches in diameter, and he pulled them out from between his truck and the trailer. At the time, Webb did not notice any damage to the truck or the trailer. After finishing his delivery at the alumni center, Webb continued on his route without making any accident report. Webb returned the truck and trailer to the ABF terminal in Fort Collins at the end of the day, again without making any accident report or any log entry of damage in his vehicle condition log.

Company officials contended that Webb's entanglement with tree branches at CSU caused more than $600 worth of damage, bending the exhaust stack on the tractor and crushing a corner of the trailer. At Webb's subsequent grievance hearings, Company officials introduced a picture of a tree limb measuring four inches in diameter that they contend Webb's truck pulled down. However, during the trial in this case, Webb denied that he hit a branch that size. He also testified that he later returned to CSU to look at the tree branches on the driveway of the alumni center, and he noticed the stump where the pictured four-inch limb had come from. He testified that his truck could not have pulled down that branch because the stump showed that the branch had not been pointed out over the driveway where Webb coud have hit it.

On the evening of July 30, 1993, after Webb had left work, ABF's manager at the Fort Collins terminal, Bill Higley, noticed damage to Webb's tractor and trailer. Higley took several Polaroid pictures of the vehicle, and he called ABF officials in Salt Lake City and Fort Smith, Arkansas, to report the incident. At that time, he told

ABF officials that Webb was the last driver of the damaged truck, and ABF regional vice president Sid Hatfield told Higley that failing to report an accident was a dischargeable offense.

When Webb returned to work the next Monday, Higley confronted Webb about the damage to the truck and trailer. Webb told Higley about the tree-skimming incident, and he pointed out that no driver had ever considered such an incident to be subject to the company's rule requiring the reporting of all accidents.[4] Webb also requested an opportunity to view the damage for himself, and after inspecting the vehicle, Webb provided a handwritten statement about the incident. Webb's statement indicates that Webb did not notice that the stack on the tractor was askew until Saturday morning, after he had learned from a co-worker that Higley had been taking pictures of the truck. Webb's statement also indicates that Webb did not notice any damage to the trailer until Monday morning when he was confronted about the incident. However, nowhere in the statement does Webb admit responsibility for the damage to the trailer.

When Webb finished writing out this statement, Higley informed Webb that he was fired and he should leave the ABF premises. Higley then began drafting letters to notify Webb formally that he had been discharged, with the sole basis for Webb's firing being Webb's failure to report the tree-skimming incident as an accident.[5]

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[4] There was extensive testimony during the trial from both Webb and his former co-workers that tree-skimming incidents were common for Fort Collins drivers, and that ABF had never required drivers to report such incidents as accidents under the mandatory accident-reporting policy. One witness testified that it was only after Webb was fired that the company began to require such reports for tree-skimming incidents.

[5] The pertinent part of ABF's "Letter of Discharge" states:

3. Webb's grievance

Immediately after being fired, Webb called Ron Schwab, who was the Local 17 official responsible for handling grievances out of the Fort Collins terminal, and Webb requested that the union challenge his discharge. After commenting that "we knew this was coming," Schwab agreed to file a grievance on Webb's behalf. Schwab also agreed to obtain company documents that Webb said would be helpful for the grievance, as well as to interview one of Webb's co-workers who could testify about the events leading up to Webb's discharge. Schwab, however, decided not to call any witnesses for Webb during the grievance hearing, and he failed to obtain any of the documents Webb requested.

The first hearing on Webb's grievance occurred two days after the firing, on August 4, 1993, in Denver before the joint Colorado-Wyoming Longline Grievance Committee, an arbitration panel evenly composed of union and company officials. Schwab focused his arguments during the hearing on Webb's account that the tree-skimming incident at CSU was not a reportable accident in light of the small size of the branches invoved and the fact that Webb had not noticed any damage when he was at the scene. Schwab, however, failed to object when an ABF official characterized the branch that Webb had hit as "about eight inches in diameter and about 30 foot [sic] long." Schwab also failed to review the evidence ABF prepared before the hearing, and as a result, he was taken by surprise when ABF introduced a statement by one of Webb's co-workers that detailed ABF's account of the

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> On July 30th, 1993, you were involved in an accident which has been judged preventable by the ABF Safety Department. You failed to report this accident. . . .
>
> In accordance with Article 46 of the Western Area Supplemental Agreements and Article 16 Section 3 of the National Master Freight Agreement, you are hereby discharged for failing to report a preventable accident.

damage to Webb's tractor and trailer.[6] Schwab's failure to review ABF's evidence before the hearing also may have affected his and Webb's ability to raise questions about ABF's alleged tampering with the evidence of damage to Webb's trailer.[7] Finally, despite telling Webb again before the grievance hearing that "we knew this was coming," and despite Webb specifically asking Schwab to do so, Schwab did not present Webb's allegation of retaliation—that Webb's firing was prompted by the company's desire to silence his union activiities.

The grievance committee deadlocked on the question of whether to reverse ABF's discipline. As a result, the grievance was transferred one week later to the Joint Western Area Committee ("JWAC") in San Diego, an arbitration panel whose voting members were again evenly split between union representatives and company representatives. In the days before this second hearing, Schwab apparently told Webb it wasn't necessary for Webb to be present because no new testimony or evidence would be introduced.[8]

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[6] Subsequent testimony at the trial demonstrated that ABF's manager, Bill Higley, prepared the co-worker's statement. The co-worker signed the statement two days after Higley wrote it, and four days after Webb's alleged accident.

[7] The photographs presented at Webb's grievance hearing inexplicably show different kinds of damage to the top right corner of a trailer, with two photographs showing the running light on the trailer still present but a third photograph showing the running light missing. No mention of these discrepancies was made during the grievance hearing.

[8] Schwab disputed Webb's testimony on this point. However, in light of the jury's apparent assessment of Schwab's credibility, we must accept Webb's version of events.

In any event, Schwab's statement about the JWAC proceeding turned out to be incorrect. ABF officials introduced new photographs of the alleged damage to Webb's truck at the second hearing. Also, they offered new testimony as to the specific events on the morning when Webb was fired, implying that Webb knew he

Despite his apparent discouragement of Webb's attendance at the JWAC hearing, Schwab told the JWAC panel, "Mr. Webb was invited to be present here and apparently has chosen not to be here to testify in his own behalf. The Local Union will do its best with these conditions." Schwab aso told the JWAC hearing that "the Union has no problem stipulating to the size of the tree branch. We have seen the tree branch." Schwab made this stipulation despite the fact that the only offer from ABF as to the size of the tree branch was the eight-inch-diameter claim that directly contradicted Webb's account of branches no larger than two inches in diameter. When a panel member asked Schwab whether Webb was aware that any incident that resulted in damage to company equipment was a reportable accident under the contract, Schwab responded, "I'm not Mr. Webb so I don't know exactly what his position would be because he's not here to answer that personally. . . ." In answer to another question, Schwab said, "I don't know why Mr. Webb did the things that he did at that time."

At the conclusion of the hearing, the JWAC panel upheld Webb's discharge. No reason or written decision was issued by the panel.

4. Webb's federal suit

Webb subsequently brought suit in federal court under 29 U.S.C. § 185(a) (also known as § 301 of the Labor Management Relations Act of 1947) in what is commonly referred to as a hybrid § 301/DFR (duty of fair representation) suit. Webb sued both ABF and Local 17, alleging that ABF had violated the Teamsters contract through a wrongful discharge and that Local 17 had

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had "wrecked" his truck: Rick Porter, ABF's manager for industrial relations, told the JWAC panel that Webb gave his handwritten statement "when Mr. Higley was asking him 'Did you know that you wrecked the tractor?' He said 'Let me tell you about it.'"

breached its duty to represent him fairly. Webb sought reinstatement, an award of back pay, emotional distress damages, and punitive damages. The union was dismissed out of the case pursuant to a stipulation by Webb prior to the trial. Following a seven-day trial, the jury returned a verdict in favor of Webb against ABF. The jury found that Webb's total economic damages were $112,124, and it allocated $89,699.20 of the damages to ABF.[9] The jury declined to award any damages on Webb's claim of emotional distress.[10]

5. Attorney misconduct claim

Following the end of the trial, the court fined Webb's lawyer $757 for conduct it found to be unethical.[11] This matter arose near the end of the trial when Charles Cantrell, the superintendent of ABF's repair shop in Denver, testified about the damage to the tractor and trailer that Webb was driving on the day of the accident. On cross-examination, Webb's lawyer attempted to question Cantrell about a statement Cantrell allegedy had made to the lawyer out of court.[12] The court promptly conducted a

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[9] The jury's division of damages—$89,699.20 against ABF and $22,424.80 against Local 17—represents an 80% to 20% split.

[10] The jury's finding that Webb suffered no emotional distress rendered moot ABF's claim that emotional distress damages are unavailable for a § 301 claim against an employer. As a result, we offer no opinion on that legal question.

[11] Webb filed, but eventually dropped, a cross-appeal to challenge this penalty. The issue remains a live controversy in this case because ABF has asserted that the district court's failure to grant a mistrial on the basis of this conduct was an abuse of discretion.

[12] It appears that Cantrell called Webb's lawyer in an attempt to avoid the subpoena that Webb's lawyer had served on him. Webb's lawyer told the court during the subsequent hearing on the issue that he received the call without notice and he did not ask any questions of Cantrell during the conversation. Rather, Cantrell spontaneously blurted out the statement at issue.

consultation with the attorneys out of the hearing of the jury in which she announced that the conduct by Webb's lawyer violated the ethical rule against attorney communication with a represented party and she would entertain suggestions as to the appropriate remedy. ABF moved for a mistrial, which the court denied the following day. Instead, the court gave the jury a limiting instruction to disregard any evidence of a telephone conversation between Webb's attorney and Cantrell.

Discussion

1. ABF's motion for judgment as a matter of law

This appeal comes to us following the district court's denial of ABF's Rule 50 motion for judgment as a matter of law, or in the alternative, for a new trial. We review de novo a district court's denial of judgment as a matter of law, using the same standard applicable in the district court. *See Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.), *cert. denied*, 117 S. Ct. 297 (1996). Despite the breadth of our de novo standard of review, we may upset the jury's conclusion "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party." *See Yearous v. Niobrara County Mem. Hosp.*, 128 F.3d 1351, 1353 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998). Under this standard of review, we may not "weigh the evidence, pass on the credibility of witnesses, or substitute our conclusions for that of the jury." *Id.* (quotation omitted).

In support of its claim for judgment as a matter of law, ABF argues that Webb did not establish the elements of a hybrid § 301/DFR claim because: (1) Webb failed to prove that Local 17 breached its duty of fair representation; (2) Webb failed to prove the required level of causal connection in the DFR claim, and (3) Webb failed to prove a breach of contract by ABF. Furthermore, with respect to the question of damages, ABF argues that

Webb was not entitled to an award of backpay from ABF for the period after the grievance arbitration hearings. Each of these issues intertwines questions of law with questions of fact. In light of our standard of review, we will discuss the applicable legal standards first before addressing whether the evidence was sufficient.

A. Elements of a hybrid § 301/DFR claim

Federal labor policy generally extends great deference and finality to the decision by a labor arbitrator that a company has not violated its collective bargaining agreement in firing an employee. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-64 (1983). However, this deference can result in "an unacceptable injustice" when the employee's assertion of his rights under the collective bargaining agreement has been tainted by conduct from his union that breaches its duty of fair representation toward him. *See id.* at 164 (citing *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967)). As a result, the Court has explained that,

> [W]hen the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation . . . , an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding.

Del Costello, 462 U.S. at 164 (citations omitted).

The kind of suit authorized in *Vaca*, *Hines*, and *DelCostello* is a "hybrid" action under § 301 because it combines two conceptually independent causes of action, the first against the company for breach of the contract (a standard § 301 claim) and the second against the union for breach of the duty of fair representation (a claim implied by operation of a union's status under federal law

as the sole bargaining representative of the employee). *See DelCostello,* 462 U.S. at 164. To prevail against his former employer under this hybrid § 301/DFR cause of action, a discharged worker must prove three elements: (1) Some conduct by the worker's union that breached the duty of fair representation; (2) A causal connection showing that the union's breach affected the integrity of the arbitration process, and; (3) A violation of the collective bargaining agreement by the company. *See Hines,* 424 U.S. at 568 ("[W]here the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is . . . on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings."). The plaintiff in a hybrid § 301/DFR action need not sue both his union and former employer in the same case, and he may choose to seek damages against only one of the potential defendants, but in any event, "the case he must prove is the same whether he sues one, the other, or both." *See DelCostello,* 462 U.S. at 165.

B. Local 17's duty of fair representation

In light of a union's position as the sole and exclusive bargaining representative of an employee with his employer, every collective bargaining union has a duty to represent its members fairly in its dealings with management. *See DelCostello,* 462 U.S. at 164 & n. 14. The scope of this duty in the context of a grievance arbitration proceeding requires that the union "may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *See Vaca* 386 U.S. at 191. The Supreme Court has consistently repeated this standard for a DFR claim: "A duty-of-fair-representation claim arises when a union that represents an employee in a grievance or arbitration procedure acts in a 'discriminatory, dis-

honest, arbitrary, or perfunctory' fashion.' " *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 864 n.6 (1987) (quoting *Delcostello*, 462 U.S. at 164); *see also International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979) ("In particular, a union breaches its duty when its conduct is 'arbitrary, discriminatory, or in bad faith,' as, for example, when it 'arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion.' ") (quoting *Vaca*, 386 U.S. at 190, 191).

In similar vein, this circuit also has reiterated the DFR standard as prohibiting arbitrary, discriminatory, bad faith, or perfunctory conduct. *See Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710, 714-15 (10th Cir. 1978) (quoting and discussing *Vaca* and *Hines*), *rev'd on other grounds*, 442 U.S. 42 (1979); *Nelson v. Holmes Freight Lines, Inc.*, 37 F.3d 591, 594 & n.4 (10th Cir. 1994) (quoting and discussing *Vaca*); *Young v. United Auto. Workers-Labor Employment & Training Corp.*, 95 F.3d 992, 998 (10th Cir. 1996) (quoting *Vaca*, 386 U.S. at 191); *Lampkin v. International Union, United Auto., Aerospace & Agric. Implement Workers*, No. 96-5212, slip op. at 18 (10th Cir. 1998) (proposed publish opinion now in circulation).

1. "Perfunctory" grievance processing

ABF argues that the duty of fair representation includes only a duty to avoid acting in an arbitrary, discriminatory, or bad faith fashion, but does not include an obligation to avoid acting in a perfunctory manner. Based on the authority cited above, we reject that argument. The district court properly presented to the jury the duty not to act in a perfunctory fashion,[13] and we

[13] The text of Jury Instruction No. 10 provides in part:

> In order to prevail against his employer on his claim under 29 U.S.C. § 185, plaintiff Rick Webb must prove . . .
>
> 2. That the Teamsters Local No. 17 breached its duty of fair representation to the plaintiff by:

believe the jury verdict can be upheld on the basis of that duty.

ABF relies principally on the Supreme Court's most recent hybrid §301/DFR case, in which the Court stated that a union's duty of fair representation is "tripartite," *i.e.*, a union's actions may not be " 'arbitrary, discriminatory, or in bad faith.' " *See Air Line Pilots Ass'n. Int'l v. O'Neill*, 499 U.S. 65, 67 & 77 (1991) (quoting *Vaca*, 386 U.S. at 190)). In its omission of the duty to avoid "perfunctory" conduct, the *O'Neill* articulation of a union's "tripartite" duties appears to back away from earlier case law stressing that a union is under a legal obligation not to conduct its dealings with its members in a "perfunctory fashion." However, we believe that the prohibition against "perfunctory" conduct remains the law despite its absence from the discussion in *O'Neill*.

First, the dispute in *O'Neill* involved claims of union misconduct in the context of contract *formation*, as opposed to contract *administration* in a grievance proceeding. *See id.* at 70. Thus, under the facts in *O'Neill* there was no need to address the question of a union's duties when a union member seeks to challenge a discharge in a grievance proceeding. Indeed, it would have been dictum in *O'Neill* for the Court to express any opinion as to the DFR standards for a grievance arbitration in light of the fact that the *O'Neill* case arose before any grievance arbitration process had been established by the parties.

Second, it is easy to read the Court's earlier cases prohibiting "perfunctory" grievance processing as merely expressing a concrete example of the kind of specific conduct prohibited by the tripartite standard. *See Foust*, 442 U.S. at 47 (listing perfunctory handling of a grievance as an "example" of union conduct that is "arbitrary, discrim-

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(a) failing properly to process his grievance; and

(b) acting in a discriminatory, dishonest, arbitrary, or perfunctory fashion.

inatory or in bad faith"). If "perfunctory" grievance processing is a specific kind of conduct under the tripartite standard, then *O'Neill*'s failure to mention this particularized DFR standard is immaterial.

In part, any potential doubt as to the applicability of the prohibition against "perfunctory" conduct may arise from the fact that courts generally have failed to give content to the meaning of that term. Indeed, the most this circuit has ever said on the meaning of the prohibition against "perfunctory" conduct is that one union's handling of a member's grievance was not perfunctory when "the record shows a prompt and diligent effort by the union business agent . . . to have appellant's grievance heard and decided by the panel." *See Nelson*, 37 F.3d at 594 n.4.

The other circuits have similarly had little to say about the meaning of the term "perfunctory." The most detailed explanation comes from the Eighth Circuit, where the court explained that "we construe the Supreme Court's reference in *Vaca* to the 'perfunctory' processing of a grievance to mean that 'the union acted without concern or solicitude, or gave a claim only cursory attention.'" *Beavers v. United Paperworkers Int'l Union, Local 1741*, 72 F.3d 97, 100 (8th Cir. 1995) (quoting *Curtis v. United Transp. Union*, 700 F.2d 457, 458 (8th Cir. 1983)). The Eighth Circuit's construction comports with the standard dictionary definition of "perfunctory." *See Websters Third New International Dictionary (Unabridged)* 1678 (1986) (defining perfunctory as "characterized by routine or superficiality: done merely as a duty: CURSORY, MECHANICAL . . . lacking in interest or enthusiasm: APATHETIC, INDIFFERENT").

This is not to say that a union violates its duty of fair representation by mere negligent conduct; carelessness or honest mistakes are not sufficient to impose liability on a union. *See United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990); *Young*, 95 F.3d at 997. We need not

here define the line between negligent conduct and perfunctory conduct because the evidence was sufficient to allow a jury to find, as it did, that the union conducted this arbitration in such a perfunctory, apathetic, indifferent, and cursory way that Local 17 breached its duty of fair representation.[14] Indeed the evidence was sufficient to support not just a finding of perfunctory conduct, but also conduct by the union that rose to the level of bad faith. *See Young*, 95 F.3d at 996 n.1 (noting that bad faith in a DFR claim "requires a showing of fraud or deceitful or dishonest action").

2. Pre-arbitration investigation

Next, ABF argues that the union did not have an obligation to conduct its own investigation of Webb's grievance because Webb undertook to do the investigation himself. ABF also contends that a union has no legal duty to

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[14] Webb's evidence could have allowed a reasonable juror to reach at least the following conclusions: (1) Local 17 failed to present a grievance claim of retaliation despite Webb's request to do so and despite Schwab's belief that Webb's firing was indeed a case of retaliation; (2) Schwab failed to follow Local 17's regular practice in grievance cases of reviewing company evidence before the arbitration hearings; (3) Schwab affirmatively misled Webb by telling Webb that his presence was not needed at the second grievance hearing in San Diego and that no new evidence or testimony would be allowed; (4) Schwab affirmatively misled the JWAC grievance panel in San Diego when he told the panel members that he did not know why Webb had chosen not to come to the hearing; (5) Schwab disparaged his own union member before the JWAC panel by suggesting that there was no explanation for Webb's conduct in the tree-skimming incident; and (6) Schwab directly contradicted Webb's own account of the incident by accepting the company's claims as to the size of the tree limbs that Webb had hit.

ABF insists these conclusions are contradicted by testimony from Schwab and others. However, this contention misunderstands our standard of review, which must uphold the jury's verdict if any reasonable juror could have ruled as the jury did. *See Yearous*, 128 F.3d at 1353.

conduct "some minimal investigation" of a grievance complaint.[15]

In *Foust*, the Tenth Circuit agreed with other circuits that "the failure to investigate the merits of a grievance could be arbitrary conduct and a breach of a duty." *See Foust*, 572 F.2d at 716 (citing *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970); *Hughes v. International Bhd. of Teamsters, Local 683*, 554 F.2d 365 (9th Cir. 1977)). The amount of investigation required of a union to meet its duty of fair representation depends on the circumstances of each case. *See Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995) (holding that the thoroughness of a union's required investigation depends on the particular case); *Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1395 (9th Cir. 1985) (same).

In this case, a reasonable juror could have concluded that Local 17 made no serious effort to investigate the facts of Webb's claims. The jury also could, and apparently did, disbelieve the testimony from Schwab that Local 17 had no obligation to conduct its own investigation because Webb allegedy had agreed to undertake the investigation himself. It appears that the jury found Webb more credible than Schwab, and it is not for us to upset that credibility determination. *See Yearous*, 128 F.3d at 1353. Thus, we find the evidence sufficient to support Webb's contention that Local 17 breached its duty of fair

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[15] Jury Instruction No. 17 provides as follows:

> An incomplete investigation of a grievance, or not making evry conceivable argument on behalf of the grievant during the grievance procedure, does not violate the union's duty of fair representation unless the union's actions were discriminatory, dishonest, arbitrary or perfunctory. However, some minimal investigation is required.

At trial, ABF objected to the last sentence of this instruction on the grounds that "there is no minimum investigation threshold under the duty of fair representation cases."

representation by failing to undertake an adequate investigation under the circumstances.

3. Judicial estoppel from a grievance arbitration

At the conclusion of the first grievance hearing, the chairman of the grievance committee, a company representative, engaged Webb in the following colloquy:

> Chairman Bradfield: I will now ask the grievant, based on the issue of your failure to report an accident are you satisfied that the Union has represented your position properly?
>
> Mr. Webb: Yes.
>
> Chairman Bradfield: Have they introduced all pertinent information on your behalf in regard to this defense?
>
> Mr. Webb: Except for the bracket, I don't have anything else to say.

On the basis of these statements from Webb, ABF now suggests that Webb be precluded from raising any argument that Local 17's representation of his claims fell below the legal standards required of the union.

We reject ABF's argument for two reasons. First, ABF's contention relies on principles of judicial estoppel in which a party's statements or positions in one proceeding prevent him from subsequently raising a contradictory position in the same or related proceedings. The Tenth Circuit has firmly established that it will not be bound by the doctrine of judicial estoppel. *See Rascon v. US West Communications, Inc.*, 1998 WL 223465, at *6 (10th Cir. May 6, 1998) (to be reported at 143 F.3d 1324) (holding that claims inconsistent with others raised in administrative context are not barred by judicial estoppel); *United States v. 49.01 Acres of Land, More or Less, Situated in Osage County, Okla.*, 802 F.2d 387, 390 (10th

Cir. 1986).[16] Second, any statements Webb made at the first grievance hearing are not probative as to the quality of Local 17's representation at the second hearing in San Diego. In light of the fact that many of the DFR breaches that Webb asserted in this case involved the union's conduct at the second hearing, there is no sound reason to prevent Webb from raising his DFR claim. Therefore, the district court properly allowed Webb to present his DFR claim to the jury.

C. Causal connection between DFR breach and arbitration outcome

In *Hines v. Anchor Motor Freight, Inc.*, the Court held that a plaintiff in a hybrid § 301/DFR case is entitled to relief if he can prove "an erroneous discharge" and a union "breach of duty *tainting* the decision of the joint committee." 424 U.S. 554, 572 (1976) (emphasis added). The Court stated,

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it *seriously undermines the integrity of the arbitral process* the union's breach also removes the bar of the finality provisions of the contract.

Id. at 567 (emphasis added). In a later opinion, the Supreme Court reiterated the "seriously undermines" standard. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 (1981). The Court said, "As *Hines* makes clear, an employee may go behind a final and binding award under a collective-bargaining agreement and seek relief against his employer and union only when he demon-

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[16] Indeed, it seems likely that ABF cannot succeed on the merits of a judicial estoppel claim because one of the elements of this doctrine is that the party against whom estoppel is asserted must have prevailed on the basis of his contradictory position in the prior proceeding. *See 49.01 Acres of Land*, 802 F.2d at 390. In Webb's case, he most assuredly did not prevail.

strates that his union's breach of its duty 'seriously undermine[d] the integrity of the arbitral process.' " *Id.* (quoting *Hines*, 424 U.S. at 567); *see also Barnett v. United Air Lines, Inc.*, 738 F.2d 358, 362 (10th Cir. 1984) ("If an employee can establish that his union breached its implied duty of fair representation, then even a *binding* decision of the [grievance arbitration] board can be set aside if the breach seriously undermined the integrity of the arbitral process.").

In its brief on appeal, ABF contends that the appropriate causation standard in this case is the "but for" standard expressed in *Edwards v. International Union, United Plant Guard Workers of America*, 46 F.3d 1047, 1051 (10th Cir. 1995). We reject ABF's argument on this point. First, the discussion in *Edwards* was dicta—the issue to be decided in *Edwards* was not the definition of the elements of a hybrid § 301/DFR case, but rather the appropriate statute of limitations in such a case. *See id.* at 1053. As a result, we are not bound by the *Edwards* panel's articulation. *See Bates v. Department of Corrections*, 81 F.3d 1008, 1011 (10th Cir. 1996) (holding that one panel is not bound by a prior panel's dicta). Second, in light of the conflict between *Edwards* and *Barnett*, we note that this circuit follows the rule that "when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom." *See Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996).

Having concluded that we must rely on the "seriously undermines" language from *Hines* and *Barnett*, we also conclude that there was sufficient evidence from which a reasonable juror could conclude that Local 17's DFR breach "seriously undermined" Webb's grievance proceedings.[17] Taken in the light most favorable to Webb, the

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[17] According to Jury Instruction No. 10, to award damages to the plaintiff the jury in Webb's case was required to find "That the breach of its duty of fair representation by Teamsters Local

record shows that Local 17 misled Webb about the second grievance hearing in San Diego and that Local 17 misled the JWAC hearing panel about the nature of Webb's tree-skimming incident and Webb's explanation for his lack of a report to company officials about it. Indeed, Schwab's concessions allow a reasonable inference that Local 17 deliberately attempted to submarine Webb's case by sending the JWAC panel a message that Local 17 had no faith in Webb's claims and was merely going through the motions on his behalf. This record meets the causation standard under *Hines* and *Barnett*.

ABF, on the other hand, points to the testimony from the chairman of the JWAC board, E. James Roberts, who suggested that Webb's handwritten statement was sufficient evidence alone to uphold his discharge. Putting aside the dubious validity of a single, non-voting chairman of an arbitration panel testifying as to the state of mind of the entire panel, ABF's argument misunderstands our standard of review in this appeal. Merely because there is some evidence in the record supporting ABF's position will not cause us to upset the jury's verdict. Instead, ABF must show that there is *no* evidence in the record that would allow a reasonable juror to find for Webb. *See Yeaous*, 128 F.3d at 1351. We believe there is sufficient evidence to support the verdict on the causation element. The fact that there is some contradictory evidence in the record is immaterial.

D. Breach of contract

During the course of the trial below, Webb presented two different grounds for finding that ABF had breached the collective bargaining agreement. First, Webb argued that ABF's asserted rationale for firing him—that he had failed to report an accident as required by Article 16 of the national contract—was baseless because the tree-

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No. 17 seriously undermined the integrity of the grievance proceeding."

skimming incident was not a reportable accident under the custom and practice at the ABF terminal in Fort Collins. Second, Webb argued that ABF's actual reason for firing him was to retaliate for Webb's union activities, which was a violation of Article 21 of the national contract.[18] ABF responds that Webb's tree-skimming incident was a reportable accident under the contract, and therefore, Webb's failure to report was a sufficient basis for the discharge. ABF also argues that Webb should have been precluded from submitting his retaliation claim to the jury because he failed to exhaust it in the grievance arbitration proceeding.

1. Failure to report an accident

There is no dispute in this case that Article 16, section 3 of the *National Master Freight Agreement* requires all employees "involved in any accident" to report that accident "immediately." Instead, the dispute focuses on what is an "accident" under the Teamsters contract. ABF contends that any incident that causes damage to company equipment or to the property of a customer is an "accident." Webb, on the other hand, contends that at least within the experience of ABF employees in Fort Collins and Denver prior to his discharge, brushes with overhanging branches that caused limited damage to ABF's trucks were not "accidents."

It is well-established that when interpreting the terms of a labor contract, a fact-finder is entitled—and indeed,

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[18] Article 21 of the *National Master Freight Agreement* provides as follows:

> **Union Activities**
>
> Any employee, member of the Union, acting in an official capacity whatsoever shall not be discriminated against for his acts as such officer of the Union so long as such acts do not interfere with the conduct of the employer's business nor shall there be any discrimination against any employee because of union membership or activities.

in some cases required—to look to the past practices of the parties and the "common law of the shop" to determine the parties' contractual obligations.[19] *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (holding that the interpretation of contract terms "is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it"); *National Labor Relations Board v. Northeast Okla. City Mfg. Co.*, 631 F.2d 669, 676 (10th Cir. 1980) ("Where past practice has established a meaning for language that is used by the parties in a new agreement, the language will be presumed to have the meaning given it by such past practice." (quotation omitted); *see also Madison Hotel v. Hotel & Restaurant Employees, Local 25*, —— F.3d ——, 1998 WL 278289, at *3 (D.C. Cir. June 2, 1998) (en banc) (upholding an arbitrator's contract interpretation in part because the arbitrator considered "the 'industrial common law' of the hotel business"); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1423 & n.12 (8th Cir. 1986) (vacating an arbitrator's award in part because the arbitrator failed to consider the "common law of the shop"). This is especially the case when a disputed contract term is ambiguous on its face and no other language in the contract provides a basis for construing the term. *See International Bhd. of Elec. Workers, Local Union No. 611 v. Public Serv. Co.*, 980 F.2d 616, 617-19 (10th Cir. 1992) (upholding an arbitrator's interpretation of ambiguous contract terms in light of the arbitrator's consideration of the parties' past practices).

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[19] Jury Instruction No. 8 reflects this understanding of the law. It states,

> The interpretation of a contract by the parties, as shown by their conduct before any dispute arose between them, is one of the best indications of their intent.

In Webb's case, he presented extensive testimony from co-workers and an ABF maintenance worker that tree-brushing incidents were common, including incidents that resulted in minor damage to ABF tractors and trailers. In no case were these incidents treated as reportable accidents, and the witnesses testified that they could not recall anyone being fired for failing to report these incidents. In light of this testimony, a reasonable juror could conclude that the "common law of the shop" at ABF's Fort Collins and Denver terminals was that minor tree-skimming incidents were not subject to the mandatory reporting provision of the contract. As a result, a reasonable juror could conclude that ABF breached the contract by firing Webb for an incident that was not a reportable accident. Therefore, ABF is not entitled to judgment as a matter of law on its reportable-accident claim.

2. *Retaliation for union activities*

ABF contends that Webb should have been barred from presenting his retaliation claim to the jury because he failed to raise the claim during the grievance proceedings. This argument, however, founders on Webb's proof of a breach of Local 17's duty of fair representation.

As the Supreme Court explained in *Hines*, a union's DFR breach "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures." *Hines*, 424 U.S. at 567. This circuit has applied the non-exhaustion rule in several cases. *See, e.g., Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1472 (10th Cir. 1993) ("[I]n determining whether Plaintiffs are required to exhaust, the relevant inquiry is whether the Union . . . breached its duty of fair representation."); *United Food & Commercial Workers Local 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 945 (10th Cir. 1989) ("[I]f the union refuses to press or only perfunctorily presses the individual's claim, or otherwise acts arbitrarily, discriminator-

ily, or in bad faith, then the union has breached its duty of fair representation and . . . the employee has 'exhausted' his or her remedies under the collective bargaining agreement.") (quotation and citations omitted). Thus, when a union member proves that his or her ability to prosecute a particular breach of contract claim against his employer has been "seriously undermined" by the union's failure to represent him or her adequately in grievance proceedings, the union member has fulfilled the exhaustion requirement. Here, it was not error for the district court to present Webb's retaliation claim to the jury because Webb offered sufficient evidence from which a reasonable juror could have concluded that having specifically requested the union to raise the retaliation issue, Webb's claim was seriously undermined by Local 17's actions in declining to raise that issue.

ABF also contends that as a matter of law Webb could not prove retaliation because he failed to show that the company official who made the decision to fire Webb—which ABF contends was Sid Hatfield—was aware at the time of Webb's protected union activities. ABF's argument is based on its premise that Hatfield did not know that it was Webb who had caused the damage that terminal manager Bill Higley had reported. However, in light of Higley's initial report to ABF headquarters that Webb was the last driver of the damaged truck, a reasonable juror could have concluded that ABF was aware of Webb's identity at the time. Therefore, ABF is not entitled to judgment as a matter of law on Webb's retaliation claim.

E. Allocation of damages between union and employer

When allocating the amount of money damages in a hybrid § 301/DFR case, "[t]he governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca v. Sipes*, 386 U.S. 171, 197 (1967); *Lamp-*

kin v. International Union, United Auto., Aerospace & Agric. Implement Workers, No. 96-5212, slip op. at 7 (10th Cir. 1998) (proposed publish opinion now in circulation) (quoting *Vaca,* 386 U.S. at 197-98). In light of this principle, we have held that the apportionment of damages "must serve the following purposes: (1) damages must be apportioned according to each party's fault, (2) the union must be held responsible for any increases in the employee's damages, which were caused by the union, and (3) the employee must be made whole." *Aguinaga v. United Food & Commercial Workers Int'l Union,* 993 F.2d 1463, 1476 (10th Cir. 1993) (quotations and citations omitted).

In Webb's case, the jury was instructed in accordance with this law,[20] and the jury determined that Webb had suffered total economic damages of $112,124. The jury then allocated $22,424.80 of the damages to Local 17 and $89,699.20 to ABF. This allocation suggests that the jury found that Local 17 was 20 percent at fault while ABF was 80 percent at fault.

ABF argues that its damages should have been capped as a matter of law to those wages that Webb lost prior to the grievance proceedings and that the district court erred in giving the jury its proportionate fault instruction. We reject this argument because it carries forward ABF's mistaken argument as to the causation standard in a DFR claim.

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[20] Jury Instruction No. 23 provides as follows:

> You must apportion any award of damages between the employer and the union according to the damages caused by the fault of each. Damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight Systems, Inc. should not be charged to Teamsters Local Union No. 17, and increases in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb should not be charged to the employer. The combined amount of these damages should make Rick Webb whole.

ABF contends that all of the economic damages Webb incurred after the grievance hearings are attributable to Local 17 because "but for" the union's DFR breach Webb would have prevailed in the grievance hearings and he would have been reinstated to his job. However, Local 17's DFR breach need not have been the "but for" cause of Webb's subsequent economic damages; instead, Webb only needed to prove that Local 17's actions "seriously undermined the integrity of the arbitration proceedings." *See Hines v. Anchor Motor Freight,* 424 U.S. 554, 567 (1976). In light of this standard, it is logically possible for a jury to assess damages against an employer based on proportionate fault that includes damages incurred after the date of the flawed grievance hearing. A proportionate fault system of allocating damages ensures that the "primary wrongdoer" shoulders an appropriate burden, especially when an allocation of damages based on the grievance arbitration date would shift a disproportionate amount of damages onto the party that was less at fault. *See Aguinaga,* 993 F.2d at 1476. Furthermore, *Aguinaga* directly contradicts ABF's claim here that a chronological allocation of damages based on the date of Webb's grievance hearing was the required method of apportionment: "[W]e hold that the hypothetical arbitration date method [of allocating damages] is not required in every hybrid case . . . ." *Id.* at 1477. Thus, ABF is not entitled to judgment as a matter of law on its allocation of damages claim.

II. ABF's motion for a new trial

In addition to its request for judgment as a matter of law, ABF moved for a new trial in light of various procedural decisions by the court that ABF argues were in error. We review the denial of a motion for a new trial for an abuse of discretion, and we may reverse the district court "only if [it] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *See Weese v. Schukman,* 98 F.3d 542, 549

(10th Cir. 1996). Furthermore, under Fed. R. Civ. P. 61, a party is entitled to a new trial only if the alleged error "affect[ed] the substantial rights of the parties."

A. Attorney Misconduct

ABF contends that Webb's lawyer, John R. Olsen, committed an ethical breach in communicating with ABF's maintenance supervisor Charles Cantrell at a time when Olsen knew that Cantrell was a management representative for ABF. ABF argues that this ethical breach caused such prejudice to ABF's substantial rights that the district court's curative instruction was insufficient. As a result, ABF asserts that the district court abused its discretion in failing to order a new trial.

The applicable Rule of Professional Conduct in Colorado provides,

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Colo. R. Prof. Conduct 4.2. We are not convinced that Olsen's conduct with respect to Charles Cantrell ran afoul of Rule 4.2 because he did not initiate the communication with Cantrell and he did not ask any questions of Cantrell during their brief telephone conversation. Cantrell blurted out his claim—that he did not know anything about Webb's case—without any prompting from Olsen. Thus, Olsen's attempt to raise Cantrell's statement during cross-examination may not have been inappropriate.

In any event, the district court promptly gave the jury a curative instruction, advising them to disregard this portion of the examination. Even if it was improper for Olsen to have asked the question, it was adequately addressed by the district court, and we see no error here

that would render the failure to grant a new trial an abuse of discretion.

B. Evidentiary Rulings

ABF contends that it is entitled to a new trial in light of various evidentiary decisions during the trial. Such rulings generally are committed to the very broad discretion of the trial judge, and they may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment. *See Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995). Under this standard of review, we must "give deference to the district court's evidentiary rulings." Id. Furthermore, if we find an erroneous evidentiary ruling, ABF would be entitled to a new trial only when the error affected the party's substantial rights. *See Hinds v. General Motors Corp.*, 988 F.2d 1039, 1049 (10th Cir. 1993).

1. Other discipline against Webb

Before the trial began, the district court ruled on a motion in limine that the only evidence of company discipline against Webb that would be admitted during the trial was evidence concerning events during the nine months before Webb was fired. The court based this limitation on the provisions of the collective bargaining agreement that prevent an employer from considering multiple disciplinary incidents outside a nine-month window and the fact that ABF's basis for firing Webb was solely Webb's failure to report the incident at CSU.

ABF challenges the district court's ruling on the grounds that Webb was allowed to introduce evidence to support his claim of retaliation. ABF contends that because Webb was allowed to claim retaliation, ABF should have been allowed to present evidence of Webb's disciplinary record going farther back than nine months.

ABF's argument is unpersuasive because of its faulty premise that Webb opened the nine-month door with his retaliation claim. First, Webb's retaliation evidence—i.e., his testimony about grievances he had filed and complaints he had registered—all involved his conduct within nine months of his discharge. Second, ABF affirmatively denied having fired Webb as a result of his prior record of accidents. ABF has consistently insisted that the sole basis for the discharge was Webb's failure to report the incident at CSU. As a result, nothing about Webb's prior work history was relevant to the company's justification. Therefore, it was not an abuse of discretion to exclude ABF's evidence of Webb's prior discipline.

2. Exhibits of grievance arbitration decisions

During the course of its case-in-chief, ABF called one of its executives to testify about its interpretation of contract provisions that allow an employer to fire a worker who fails to report an accident even if the worker has no prior history of company discipline or other accidents. The executive testified that there were two arbitration precedents from other states which upheld company discharges for failing to report an accident. When ABF sought to introduce exhibits of these grievance decisions, the district court sustained Webb's objection to the exhibits. Nevertheless, the court allowed ABF to present the substance of the decisions through the testimony of ABF's executive. ABF has failed to show how it was prejudiced by the district court's decision not to allow introduction of the actual decisions, given that the substance of the grievance decisions was presented to the jury through the testimony of ABF's executive.

3. Evidence of Webb's NLRB complaint

During ABF's cross-examination of Webb, ABF attempted to introduce evidence that Webb filed an unfair labor practice charge against ABF with the National Labor Relations Board (NLRB) prior to filing the instant fed-

eral suit, claiming that his discharge was in retaliation for his union activities. Because Webb withdrew his NLRB charge after preliminary investigation, ABF sought to argue that Webb did not believe his retaliation calim had merit. The district court excluded this evidence as not relevant because there could have been many reasons for Webb's decision not to pursue his NLRB charge, including difficulties in his divorce and responsibility for his children. We find no abuse of discretion in the district court's decision to exclude the NLRB evidence.

4. Excerpts of Webb's deposition testimony

At the close of all the evidence in this case, ABF sought to introduce blown-up reprints showing excerpts from Webb's pre-trial deposition. These exhibits illustrated various portions of Webb's deposition testimony that ABF contends contradicted Webb's testimony at trial. The district court excluded the exhibits on the grounds that the jury had heard the deposition testimony during ABF's efforts to impeach Webb on cross-examination.

We find no abuse of discretion in the district court's decision. Our own review of the proffered excerpts confirms the implication that the exhibits were merely cumulative and offered nothing new. In addition, because ABF failed to identify any contradictory statements in the proffered deposition excerpts that were not already brought out during ABF's cross-examination of Webb, we can find no prejudice.

5. Emotional distress evidence

The district court allowed Webb to present evidence of his emotional distress. ABF now argues that the court abused its discretion by admitting this evidence because ABF contends emotional distress damages are not available against an employer in a § 301 case.

We need not reach ABF's substantive argument, however, because the jury found no basis for awarding emo-

tional distress damages and refused to award any money on that claim. Thus, there was no prejudice to ABF from the admission of the emotional distress evidence. ABF argues that this evidence "likely" influenced the jury's verdict on the primary liability issues as well as on the jury's allocation of fault between ABF and Local 17. However, the district court instructed the jury that it could not award emotional distress damages unless it first found that Webb's case involved "extreme and outrageous misconduct" and that he had suffered "severe emotional distress." We presume the jury followed the court's instruction to disregard the emotional distress evidence in the absence of these findings. *See United States v. Castillo*, 140 F.3d 874, 884 (10th Cir. 1998) ("A central assumption of our jurisprudence is that juries follow the instructions they receive.").

6. Hearsay statements by Schwab

During the course of Webb's direct testimony, he discussed Schwab's reaction to the news that ABF had fired Webb. Webb testified over ABF's hearsay objection that Schwab had said, "We knew this was coming," indicating that Schwab felt Webb's firing came in reaction to Webb's union activities. Prior to eliciting this testimony, the district court instructed the jury on the definition of hearsay and on Webb's stipulation that the Schwab statement was non-hearsay because it was not offered to prove the truth of Webb's claim that his firing was retaliatory. ABF contends that it was an abuse of discretion to admit this testimony because the only purpose for offering Schwab's statement was to prove the truth of the matter asserted, i.e., that Webb was the victim of retaliation.

We find no abuse of discretion because we agree with the district court that Webb's testimony about Schwab's statement was not hearsay. Although Schwab's statement could have been interpreted as suggesting that ABF actually had retaliated against Webb, the district court prop-

erly instructed the jury not to consider the statement for that purpose. Instead, Schwab's statement was probative of Schwab's own state of mind and his awareness of Webb's desire to raise a retaliation claim, both of which were relevant to Webb's claim that Local 17 breached its duty of fair representation in failing to raise his retaliation claim. Thus, the court did not abuse its discretion in admitting the testimony.

C. Jury Instructions

ABF challenges a series of decisions by the district court admitting or excluding certain jury instructions. We review a trial court's decision on whether to give a particular instruction for abuse of discretion. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1509 (10th Cir.), *cert. denied*, 118 S. Ct. 626 (1997). Within the scope of this review, we will find an abuse of discretion if the challenged instruction incorrectly states the governing law. *See id.* Furthermore, "[n]o particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1365 (10th Cir. 1994) (quotation omitted). Finally, we must decide whether the jury "could seriously have been misled in its understanding of the issues and law applicable to the case before it." *United States v. Laughlin*, 26 F.3d 1523, 1528 (10th Cir. 1994).

ABF argues that two of the instructions given to the jury incorrectly stated the applicable law. First, ABF repeats its contention that Jury Instruction No. 10[21] incorrectly allowed the jury to find a breach of Local 17's duty of fair representation based on "perfunctory" conduct. Second, ABF also contends that Jury Instruction No. 17[22] incorrectly allowed the jury to find a DFR

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[21] The relevant text of Jury Instruction No. 10 is provided in footnote 13.

[22] The text of Jury Instruction No. 17 is provided in footnote 15.

breach if Local 17 failed to conduct at least a "minimal investigation." Both of these claims, however, rely on legal arguments rejected in our discussion, in Part I.A above, on the substantive scope of a hybrid § 301/DFR case. Because these instructions accurately stated the law, there was no abuse of discretion in overruling ABF's objections to them.

ABF also challenges the district court's refusal to give five of its proposed jury instructions. We have reviewed each of ABF's claims, and in each instance, the language proposed by ABF either was adequately conveyed by the instructions the court did give, constituted an incorrect statement of the law, or was without evidentiary support. Therefore we find no abuse of discretion.

D. Special verdict form

In addition to its challenges to the district court's jury instructions, ABF also raises two challenges to the wording of the special verdict form given to the jury. We will review the language of a special verdict form with the same abuse of discretion standard that we apply to jury instructions. *See United States v. Reed,* Nos. 97-10053, 97-10072, — F.3d —, 1998 WL 372749, at *2 (9th Cir. July 7, 1998).

ABF's first contention points to the wording of the initial question in the special verdict form, which asks the jury to decide whether Webb was "wrongfully discharged." ABF argues that the phrase "wrongfully discharged" incorrectly characterizes the legal requirement of finding that Webb's firing breached the collective bargaining agreement. We see no mischaracterization in the use of the phrase "wrongfully discharged" instead of "breached the contract." Furthermore, we note that Jury Instruction No. 10 ensures that the jury was aware that in order to find that Webb was "wrongfully discharged," it must find that "ABF Freight Systems Inc. violated the National Master Freight Agreement by terminating Webb from his

employment without 'just cause' or other valid reason under said contract." As a result, we find no abuse of discretion in the special verdict form's use of the words "wrongfully discharged."

ABF next contends that the special verdict form incorrectly failed to set forth a "but for" causation standard for Webb's DFR claim. However, as we discussed above in Part I.C., the case law does not require a "but for" causation standard in a DFR case.

E. Excessive damages

ABF's final basis for claiming a right to a new trial is a rearticulation of its earlier argument on the allocation of damages. ABF contends that the jury's award of $89,699.20 in damages against ABF was "plainly excessive" because this amount includes lost wages incurred by Webb after the date of the grievance hearings. However, as discussed above in Part I.E., the jury properly allocated damages on the basis of its findings of proportional fault. As a result, we reject ABF's related claim that the damages are excessive.

Conclusion

In this case, a properly instructed jury having heard seven days of testimony found that Teamsters Local 17 had breached its duty of fair representation to Rick Webb and that this breach seriously undermined Webb's ability to defend his rights under the collective bargaining agreement after ABF Freight System had wrongfully terminated his employment. We have found no errors of law or abuse of discretion in the proceedings below, and therefore, we AFFIRM.

APPENDIX B

[Jury Instruction Given to Jury
(May 14, 1997, Tr. at 1270)]

INSTRUCTION NO. 23

You must apportion any award of damages between the employer and the union according to the damages caused by the fault of each. Damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight Systems, Inc. should not be charged to Teamsters Local Union No. 17, and increases in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb should not be charged to the employer. The combined amount of these damages should make Rick Webb whole.

APPENDIX C

[Proposed Jury Instruction, Rejected by District Court]

INSTRUCTION NO. 36

You must separate from Rick Webb's damages the portion of those damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight System, Inc. from the increase in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb. You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident. Citation: *Bowen v. United States Postal Service*, 459 U.S. 212, 215 (1983); *Aguinaga v. United Food and Commercial Workers*, 993 F.2d 1463, 1475-1477 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 880 (1994).

Supreme Court, U.S.
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No. 98-1154

In the

Supreme Court of the United States

October Term, 1998

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

RICK WEBB,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this court should deny the petition because it seeks a rule of law that was not requested of the trial court?

II. Whether this court should deny the petition because there was substantial evidence of collusion between the employer and the union, and substantial evidence that each participated in the other's breach?

III. Whether this court should deny the petition because the employer tried to, and did, taint the grievance process with the presentation of fabricated physical evidence?

IV. Whether this court should deny the petition because it seeks to shift the burden almost totally away from the primary wrongdoer?

V. Whether this court should deny the petition because the district court did not foreclose use of the grievance date method of allocating damages, and the court of appeals said only that it was not required in every case?

VI. Whether this court should deny the petition because the petitioner is actually contesting the district court's refusal to allow a jury instruction that highlighted only a small portion of the evidence?

VII. Whether this court should deny the petition because the instruction sought by the petitioner was embodied within another instruction that the jury was given?

VIII. Whether this court should deny the petition because there has been no confusion within the courts of appeals regarding apportioning damages when there are multiple factors?

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RESPONDENT'S BRIEF IN OPPOSITION

Rick Webb (hereinafter "Webb"), by his undersigned counsel, respectfully opposes the petition for writ of certiorari to review the judgment of the court of appeals in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 155 F.3d 1230 and is set forth at App. A. 1a-35a.

JURISDICTION

Respondent accepts the jurisdictional statement in the Petition.

STATUTORY PROVISION INVOLVED

Respondent accepts the statutory statement in the Petition.

STATEMENT OF FACTS AND PROCEEDINGS

A. Facts of the Underlying Matter

Omitted or Misstated Facts

This is a fact-specific case in which the jury determined a myriad disputes within the evidence. These included pervasive issues of witness credibility, retaliation against a union steward for his union work, termination of a union steward for opposing the dispatch of illegal overweight trucks onto Colorado highways, and fabrication of physical evidence for use against the same union steward in grievance proceedings that followed his

firing. The jury's unanimous verdict was in favor of Webb. The court of appeals found no error and affirmed.

The instant petition is premised upon petitioner's request to the trial judge for a certain jury instruction, which jury instruction on its face did not preserve the issue that is now presented in the petition.

The instant petition also contains a misstatement of fact upon which the entire petition is premised, an assertion by the petitioner that "there has never been any allegation that the Company and the Union conspired with each other to deprive Webb of his rights or otherwise participated in the other's wrong." Pet. 22, n. 8.

The trial judge noted otherwise. Most of the case was premised upon overt collusion between the company and the union. After plaintiff's evidence was substantially presented before the jury, the trial judge stated that she would permit the issue of emotional damages to go to the jury because of evidence of the employer's fabrication of physical evidence in the grievance hearing, as well as collusion between the employer and the union. The trial judge summarized the plaintiff's case after much of the evidence was in, noting the evidence of collusion:

> TRIAL COURT: "If, indeed, the plaintiff's evidence is to be believed -- if the jury believes it -- that evidence was fabricated in this case; that there was some sort of agreements and plans between the union and the employer . . . ."

In sum, the petitioner's statement at Pet. 22, n. 8 is fatally undermined by an assessment of Webb's trial evidence by the trial judge herself.[1]

The petition omits numerous other pertinent facts of Webb's proof at trial, including the aforesaid evidence that the employer fabricated pivotal physical evidence to taint the grievance proceeding. Again, the trial judge noted the presentation of this evidence during trial, and it is not now necessary to delineate said evidence, fact by fact, for purposes of the instant petition. Said evidence was, as the trial court stated, appropriately in the jury's domain and weighty enough for jury consideration of what the trial court called "special damages" for "extreme and outrageous misconduct."

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[1] Petitioner inadvertently notes one of the motivations for the collusion between company and union against Webb, which was established at trial. Pet. 3, n. 1.

Petitioner's Requested Jury Instruction

Petitioner seeks a blanket rule of apportionment of damages that would require a trial court to instruct the jury that the union is responsible for all damages after the date that an untainted grievance proceeding should have been afforded the grievant.

However, this is not what the petitioner requested of the trial court. Petitioner (may also be referred to as "defendant") submitted a jury instruction labeled "No. 7" and made the following argument:

> DEFENDANT'S COUNSEL: "With regard to instruction No. 7 with regard to allocation, we request an instruction that the jury should be allowed to separate damages on the JWAC. Both the *Bowen* and *Aguinaga* cases that is an acceptable amendment for the jury to use, and they should be instructed they could use that."

The defendant's argument was incomprehensible. Additionally, no defendant's instruction No. 7 was placed in the record for the court of appeals to review. Defendant's counsel submitted only defendant's instruction Nos. 23, 28, 29, 32 and 36. Assuming *arguendo* that the referenced (but lost or withdrawn) instruction No. 7 set forth petitioner's now-espoused version of apportionment -- that the grievance hearing date is an absolute cut-off after which all damages become the union's responsibility -- even the petitioner's

counsel did not express such an extreme view to the trial court during the preparation of jury instructions. Instead, defendant's counsel argued that the jury should be instructed that it "could" use such a method of apportionment, as set forth above, not that it "must."

The only proposed jury instruction that the defendant's counsel made part of the record for appellate purposes on the issue of apportionment was its instruction No. 36:

> "You must separate from Rick Webb's damages the portion of those damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight System, Inc. from the increase in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb. You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident." Pet. 5-6, and App. A. at 37a.

Thus, the proffered instruction by the defendant contained the phrase "may separate these damages based upon the date" not "*must* separate these damages based upon the date." In sum, the defendant's proffered instruction would have made apportionment by that method merely optional or voluntary for the jury.

The apportionment instruction ultimately selected and given by the trial judge did not forbid use of such a method of apportionment based upon the date of the grievance hearing, nor did it forbid consideration of the grievance hearing date as a factor in apportioning damages. The jury was instructed:

> "You must apportion any award of damages between the employer and the union according to the damages caused by the fault of each. Damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight Systems, Inc. should not be charged to Teamsters Local Union No. 17, and increases in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb should not be charged to the employer. The combined amount of these damages should make Rick Webb whole." Pet. 6, and App. A. at 36a.

Again, at no time did the trial court forbid the jury from using the date cutoff method of apportionment. What the trial court refused to do is highlight that single method or single factor within the jury instructions when requested to do so by the defendant (but requested merely as an optional or voluntary method not as a mandatory method).

The jury then apportioned Webb's damages. The employer was responsible for $89,699.20, the union $22,424.80.

B. Proceedings in the District Court

Respondent accepts the petitioner's discussion of proceedings in the trial court except as discussed *supra*, and as follows: the jury instruction conference was conducted by the trial court on July 16, 1996, and the trial court afforded opportunity for the parties to argue for and against jury instructions, and to proffer those sought. In its petition, the petitioner asserts that at the close of the trial, the petitioner "requested that the court instruct the jury that it must apportion Webb's back pay damages between the Company and the Union according to the date of the JWAC hearing." Pet. 5.

To the contrary, at the jury instruction conference the petitioner did not make any argument for "must" apportionment according to date but instead made the statement cited *supra* regarding (lost or withdrawn) instruction No. 7. But even counsel's statement or argument regarding instruction No. 7 did not ask for the "must" language but, at best, asked that the jury be instructed that it "could" use such an apportionment method if it wanted to. Thus, the petitioner's request was to make such a method optional or voluntary for the jury.

The petitioner did submit another instruction regarding apportionment -- instruction No. 36 -- but it only called for the "may" language, as discussed *supra*. Thus, again, the petitioner requested of the trial court only that the apportionment method by date be optional or voluntary for the jury, not that it be mandatory. Making it mandatory, a different argument altogether, is the basis of the petition brought now.

The issue of apportionment went to the jury on a special verdict form with the question: "What amount of the damages stated in answer 4 is attributable to the Union, and what amount is attributable to ABF Freight Systems, Inc.?"

The petitioner's attorney made no specific objection to this portion of the verdict form and said:

> "With respect to the special verdict form the way the questions are framed, we don't think accurately tracks the elements in the statute.
>
> "We also requested that the jury just be answering the questions without also being informed that they couldn't answer all the questions depending on the way they answered them. We would have requested that the Court merely asked them to answer the questions without any knowledge of the impact that would have on the Court's final judgment and then have the Court enter

> judgment in accordance with how they answered the questions.
>
> "Finally I think this may be being done; we wanted the allocation done separately for emotional distress."[2]

Thus, the petitioner's counsel did not object to the apportionment language in the special verdict form.

The trial court evidence also included substantial proof that the petitioner had corrupted the grievance procedure by actually fabricating false physical evidence against Webb. The manufactured evidence included presentation of an oversized and irrelevant tree limb as well as the rejuvenation of old damage on a trailer to make it look new and thus allegedly caused by Webb (to justify his firing). It was this "fabricated" evidence that the trial judge highlighted in plaintiff's case and in permitting a rare emotional distress instruction to go to the jury, as discussed *supra*.

Thus, if the jury believed the plaintiff's evidence, the company tried (in multiple ways) to corrupt and taint the grievance process.

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[2] This request by the petitioner was granted and the allocation instruction was repeated to the jury as to emotional distress. However, the jury did not award any emotional distress damages.

C. Proceedings in the Court of Appeals.

Respondent accepts the petitioner's discussion of proceedings in the court of appeals except as follows with pertinence to the issues of the petition:

The court of appeals stated that the union representative failed to call any witnesses for Webb during the grievance hearing and failed to obtain any of the documents that Webb had requested, breaching his promise to Webb. App. A. at 6a. The court of appeals stated that the union representative also failed to object when a damaged tree limb was characterized as being eight inches in diameter and about 30 feet long [*Id.*], and he generally failed to review the evidence [*Id.*].

The court of appeals noted the company's alleged tampering with evidence and, in a footnote, discussed some of it:

> The photographs presented at Webb's grievance hearing inexplicably show different kinds of damage to the top right corner of a trailer, with two photographs showing the running light on the trailer still present but a third photograph showing the running light missing." App. A. at 7a, n. 7.

The court of appeals stated that the union representative failed to present Webb's allegation of retaliation at the grievance hearing despite having been asked to, and despite the representative saying "we knew

this was coming." App. A. at 7a. Furthermore, the union representative apparently told Webb that it was not necessary for him to be present for the next grievance step in San Diego because no new testimony or evidence could be introduced. This was false. App. A. at 7a-7b. In San Diego the union representative stipulated to admission of the grossly oversized tree branch submitted by the company and also made the following statements undermining Webb's cause: "I'm not Mr. Webb so I don't know exactly what his position would be because he's not here to answer that personally. . . ." "I don't know why Mr. Webb did the things that he did at that time." App. A. at 8a.

The court of appeals also reiterated that a reasonable juror could have found that the union representative failed to present Webb's retaliation claim despite the union representative's belief that Webb's firing was retaliatory; that the union representative failed to follow regular practices for processing grievances; that the union representative affirmatively misled Webb regarding grievance procedures in San Diego; that the union representative affirmatively misled the grievance panel; that the union representative disparaged his own union member before the grievance panel; that the union representative contradicted Webb's own account of the incident "by accepting the company's claims as to the size of the tree limbs that Webb had hit." App. A. at 16a, n. 14.

The court of appeals found further that, "Indeed, [the union representative's] concessions allow a reasonable inference that Local 17 deliberately attempted to submarine Webb's case. . . ." App. A. at 21a.

The court of appeals was never given the opportunity to review petitioner's proposed (but lost or withdrawn) instruction No. 7, which may have been an apportionment instruction, as discussed above. Whatever that instruction said, it was not preserved in the record.

With regard to instructions that the district court did give to the jury, the petitioner argued that only two of them incorrectly stated the applicable law -- Nos. 10 and 17. App. A. at 33a. Neither of these instructions was the apportionment instruction selected by the trial court.[3] Neither of these instructions is pertinent to issues of the instant petition.

On the other hand, the petitioner did not object to the apportionment instruction selected by the district court, which is instruction No. 23. App. A. at 33a and 36a.

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[3] Instruction No. 10 set forth the elements of the union's breach of its duty of fair representation and had nothing to do with apportionment. Instruction No. 17 contained a further discussion of the union's breach of its duty of fair representation and, likewise, had nothing to do with apportionment. App. A. at 13a-13b, n. 13; 17a, n. 15; 33a-33b.

Instead, the petitioner submitted another instruction -- its own No. 36 -- which contained the additional concept that, "You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident." App. A. at 37a. Again, the verb was "may," not "must," and the court of appeals noted that petitioner's argument before the court of appeals was as follows:

> "ABF argues that its damages should have been capped as a matter of law to those wages that Webb lost prior to the grievance proceedings and that the district court erred in giving the jury its proportionate fault instruction." App. A. at 26a.

At the time of the jury instruction conference, however, the petitioner did not argue that "damages should have been capped as a matter of law." Instead, as discussed *supra*, the petitioner submitted an instruction that would have made such a method of calculation optional or voluntary for the jury ["may" separate the damages based upon the grievance hearing date]. App. A. at 37a. When given the opportunity to put objections on the record, the petitioner's counsel then argued orally only that the jury "should be instructed they *could* use that." [emphasis added]. Again, there was no request at the jury instruction conference that the damages be capped as a matter of law, only that the jury "could" use such a method of calculation if it wished to.

The instant petition is premised upon the desire for a requirement that an employer's damages must be capped as a matter of law as of the date of the grievance hearing.

The court of appeals disapproved petitioner's requested instruction No. 36.[4] It ruled:

"We have reviewed each of ABF's claims, and in each instance, the language proposed by ABF either was adequately conveyed by the instructions the court did give, constituted an incorrect statement of the law, or was without evidentiary support. Therefore we find no abuse of discretion." App. A. at 34a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS A RULE OF LAW THAT WAS NOT REQUESTED OF THE TRIAL COURT.

At the jury instruction conference, the petitioner's counsel did not request an instruction requiring a mandatory cut-off of the employer's damages as of the date of the flawed grievance hearing. Instead, the petitioner's counsel requested only that the jury "may" or "could" use such a cut-off formula. That is a far cry

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[4] The court of appeals also disapproved four other instructions that petitioner submitted. They were unrelated to the issue of apportionment. App. A. at 34a.

from the absolute cut-off that petitioner now seeks as a matter of law.

Moreover, at the jury instruction conference, the petitioner's counsel did not object to the apportionment instruction that the trial judge did select to give to the jury. Instead, counsel provided only his own version of an apportionment instruction, which used the grievance date cut-off as an optional or voluntary consideration for the jury.

Granting the instant petition will rather grossly undermine trial court procedures employed by virtually every district court in the land. Jury instruction conferences, in which counsel are required to object and/or proffer their own instructions, would be obviated and counsel could thereafter bring up new instructions and new legal concepts for appellate purposes that were not addressed at the jury instruction conference.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF COLLUSION BETWEEN THE EMPLOYER AND THE UNION, AND SUBSTANTIAL EVIDENCE THAT EACH PARTICIPATED IN THE OTHER'S BREACH.

As the trial judge recognized, Webb's evidence was substantially premised upon collusion between the employer and the union. This was one of the reasons that the trial court permitted the issue of emotional distress damages to go to the jury, as discussed *supra*.

Petitioner has conceded that where an employer and union collude, or participate in each other's breach, it is appropriate not to apportion damages at all:

> PETITIONER: "Where the employer and union collude with each other in breaching a collective bargaining agreement and denying an employee the effective processing of a grievance, it is appropriate not to apportion damages at all, but instead to hold the union and employer jointly and severally liable." Pet. 22, n. 8.

There was indeed such evidence of collusion in the instant case -- as to all aspects of the grievance process, including the identification and presentation of evidence and argument -- that the trial court discussed it as something the jury could believe ("if the jury believes it").

Moreover, and as discussed *supra*, the same evidence confirmed that the employer and the union participated in each other's breach, particularly as to the identification and presentation of evidence during the grievance process, not to mention agreements reached before hearing for the union to not even examine the employer's fabricated physical evidence and to stipulate to its admission or exaggerated description. Additionally, the evidence of union agreement as to certain falsely damaging evidence against Webb was highlighted by the court of appeals. In sum, the court of appeals observed evidence that permitted the inference that the union "deliberately attempted to submarine Webb's case. . . ." App. A. at 21a. Most of that evidence was of acts committed in conjunction with the employer before and during the grievance process.

Indeed, as the trial court stated, there was evidence from which the jury could believe that "there was some sort of agreements and plans between the union and the employer," as discussed *supra*.

Thus, the instant case presented a classic fact pattern for joint and several liability, let alone apportionment in an 80-20 percent ratio. *See, Bowen v. United States Postal Service*, 642 F.2d 79 (4th Cir. 1981), *rev'd* 459 U.S. 212, 223, n. 11 (1983) (distinguishing those situations where "the union or the employer has participated in the other's breach"); *Vaca v. Sipes*, 386 U.S. 171, 197, n. 18 (1967) (obviating joint liability when the employer and union "played no part" or "took no part" in the other's breach); *Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986) (finding it appropriate to assess joint and several liability when an employer participated in the union's breach); *Allen v. Allied Plant Maintenance Co. of Tennessee, Inc.*, 881 F.2d 291, 298-99 (6th Cir. 1989) (joint and several liability is appropriate when an employer "has participated in the union's breach of duty . . . ."); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 (7th Cir. 1992) ("The rationale behind apportionment of damages disappears when each party plays an active role in the other's breach.")

Again, serious issue is taken with the petitioner's assertion of fact in the last sentence of Pet. 22, n. 8. To the contrary, Webb's evidentiary presentation was premised upon collusion between employer and union, and recognized by the trial court as such. Thus the instant case is, for that reason alone, inappropriate to establish a mandatory apportionment formula for all future cases throughout the land, as petitioner would wish.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE EMPLOYER TRIED TO, AND DID, TAINT THE GRIEVANCE PROCESS WITH THE PRESENTATION OF FABRICATED PHYSICAL EVIDENCE.

Lest it be overlooked in this quest by the petitioner for blanket law, the facts themselves controlled almost everything that happened in this case. Indeed, the jury was entitled to believe (if it chose to) that the employer fabricated physical evidence and presented it in the grievance process. The trial court noted, "if the jury believes it -- that evidence was fabricated in this case." The court of appeals discussed certain aberrant evidence the employer presented in the grievance process. App. A. at 6a and 7a, n. 7. And the court of appeals stated, "Because of the jury's verdict in favor of the appellee, our review of the evidence is presented here in the light most favorable to the appellee." App. A. at 2a, n. 1.

Now the petitioner seeks to have its liability cut off absolutely, totally, and automatically as of the date of the very grievance hearing that it tainted with fabricated physical evidence. Under these facts, such a rule of law would be incongruous at best. At worst, it would directly reward the wrongdoer and undermine grievance proceedings nationwide.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS TO SHIFT THE BURDEN ALMOST TOTALLY AWAY FROM THE PRIMARY WRONGDOER.

The petitioner's argument is that, as a matter of law, its obligation for damages should have been cut off as of the date of the flawed grievance hearing. Thus, the petitioner would have been responsible for only a tiny fraction of Webb's damages.

Such a rule of law would assure that in most cases the primary wrongdoer, the employer who fired the employee for bogus or retaliatory reasons in the first place, would escape liability for all but a small portion of the damages.

As the court of appeals wrote, a proportionate fault system of allocating damages "ensures that the 'primary wrongdoer' shoulders an appropriate burden, especially when an allocation of damages based on the grievance date would shift a disproportionate amount of damages onto the party that was less at fault." App. A. at 27a.

One can imagine the potential upheaval in organized labor if employers understood as a matter of law that they could terminate a union member for false, extra-contractual or retaliatory reasons, knowing that the employers' damages would be quickly capped -- capped no matter what -- a mere few weeks later, at the time of the grievance hearing.

Thus, the decision of the court of appeals evinced both common sense and sound public policy.

V. THIS COURT SHOULD DENY THE PETITION BECAUSE THE DISTRICT COURT DID NOT FORECLOSE USE OF THE GRIEVANCE DATE METHOD OF ALLOCATING DAMAGES, AND THE COURT OF APPEALS SAID ONLY THAT IT WAS NOT REQUIRED IN EVERY CASE.

In quoting its own decision in *Aguinaga v. United Food & Commercial Workers International Union*, 720 F. Supp. 862 (D. Kans. 1989), *aff'd in part, rev'd in part*, 993 F.2d 1463, 1477 (10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994), the court of appeals stated in the instant case that the hypothetical grievance date method of allocating damages "is not required in every hybrid case . . . ." App. A. at 27a.

This is a far cry from forbidding its use altogether -- or forbidding it at all -- which the court of appeals did not do. The petitioner now seeks to seize said decision to establish the converse, i.e. that the grievance date method must be used in every case as a matter of law.[5]

Moreover, the district court did not forbid the jury from considering -- or the attorneys from arguing -- the grievance cut-off as either a method of apportionment or as a factor in apportionment. All the trial court did was decline to read an instruction that the jury "may" consider the grievance cut-off in its apportionment. This was the only instruction submitted on the issue by the petitioner

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[5] And petitioner seeks such a result even in this case involving collusion and tainted grievance proceedings -- seeking universal application of the date cut-off method of apportionment.

and preserved in the record (instruction No. 36). App. A. at 33a-34a and 37a.

Thus, the axiom that the grievance date method need not be used in every fact pattern is established in the instant case, just as it was in *Aguinaga, supra.*

As a writ of certiorari was denied in *Aguinaga,* 510 U.S. 1072, so should it be denied herein.

VI. THIS COURT SHOULD DENY THE PETITION BECAUSE THE PETITIONER IS ACTUALLY CONTESTING THE DISTRICT COURT'S REFUSAL TO ALLOW A JURY INSTRUCTION THAT HIGHLIGHTED ONLY A SMALL PORTION OF THE EVIDENCE.

While the petitioner now seeks a blanket rule that the grievance cut-off method of apportionment must be used in every case as a matter of law, that is not what the petitioner asked of the trial court. Instead, as discussed *supra*, the petitioner merely asked for an instruction that the jury "may" consider the cut-off date -- not that it "must." App. A. at 37a.

As such, the last sentence in the petitioner's submitted but refused instruction No. 36 would have had no more nor less effect than to call attention to a small portion of the evidence bearing on apportionment. Calling attention to only one item of evidence on the issue of apportionment might have had the effect of confusing the jury and shifting its attention from other weighty evidence

of the employer's persistent and palpable wrongdoing, i.e. away from other multiple factors supporting a larger apportionment of damages against the employer.

At best, a court's advising a jury as to evidentiary matters is discretionary. *Nudd v. Burrows*, 91 U.S. 426, 439 (1875). Thus, the trial court in this case did not abuse its discretion in refusing to highlight just one factor in apportioning damages, namely the grievance hearing date. At worst, advising a jury as to the scope of the evidence, its impact or calling attention to a particular item of evidence is error. *Young v. Godbe*, 82 U.S. 562, 565 (1872).

Indeed, the instruction requested by petitioner (instruction No. 36) would have been misleading unless it had said that the jury could consider the grievance date "among other factors" in its apportionment of damages. The petitioner did not request that of the trial court. It is axiomatic that a jury instruction that is misleading is thus properly refused. *U.S. v. Jones*, 33 U.S. 399, 415-16 (1834); *Winn v. Patterson*, 34 U.S. 663, 679 (1829).

A party is not entitled to such an instruction that assumes the existence of a fact that is actually an issue to be determined by the jury. *Winn, supra,* at 678-79.

VII. THIS COURT SHOULD DENY THE PETITION BECAUSE THE INSTRUCTION SOUGHT BY THE PETITIONER WAS EMBODIED WITHIN ANOTHER INSTRUCTION THAT THE JURY WAS GIVEN.

It is also axiomatic that there is no need to give a jury instruction that is already embodied in another instruction. *Insurance Co. v. Baring Bros. & Co.*, 87 U.S. 159, 161 (1873). In the instant case, the trial court gave an instruction to the jury that permitted it to apportion damages "between the employer and the union according to the damages caused by the fault of each." App. A. at 36a. Moreover, the trial court's instruction required that damages attributable to the union "should not be charged to the employer." *Id.*

Thus, the instruction given the jury embodied the very concept that the petitioner sought in its refused instruction No. 36, namely that the employer not be charged with damages attributable to the union. App. A. at 37a.

Finally, the instruction requested by the petitioner but refused, Instruction No. 36, would have been a misstatement of the law, because it would have denied the jury's right to apportion damages based upon other factors, including the collusion between employer and union in the case, as discussed *supra*, and the employer's tainting of the grievance proceeding itself with the introduction of faked physical evidence.[6] A requested

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[6] Given the employer's tainting of the grievance process, with evidence thereof viewed in a light most favorable to Webb and unfavorable to the employer, the employer did

instruction cannot leave out of view other evidence that the jury may consider on an issue. Refusing such a one-sided instruction is not error. *Smith v. Condry*, 42 U.S. 28, 35 (1843).

VIII. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE HAS BEEN NO CONFUSION WITHIN THE COURTS OF APPEALS REGARDING APPORTIONING DAMAGES WHEN THERE ARE MULTIPLE FACTORS.

Again, the petitioner seeks a decision that the grievance hearing date *ipso facto* cuts off an employer's liability and does so as a matter of law. The courts of appeals, including the court of appeals in both the instant case and in *Aguinaga*, *supra*, have consistently ruled that the grievance hearing date is one factor to be weighed, but certainly not the only one in all cases. In those rare cases where the grievance date appeared to serve as a cut-off for the employer's damages, said decisions were evidence-specific and fact-limited.

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not prove at trial that the grievance process would have ended Webb's damages. With the employer's use of fabricated physical evidence, there is no assurance that Webb would have prevailed in the grievance hearing even with proper union representation. Thus, his damages would have continued past the grievance hearing, having still been caused either solely or primarily by the wrongful conduct of the employer.

Contrary to petitioner's suggestion, *Bowen* v. *United States Postal Service*, 642 F.2d 79 (4th Cir. 1981), *rev'd*, 459 U.S. 212 (1983) did not mandate the ignorance of all other factors bearing on the issue of apportionment. Indeed, the court did not decide at all whether the district court's instructions on apportionment of damages were proper. *Bowen*, 459 U.S. at 230, n. 19. The court added: "Nor is it necessary in this case to consider whether there were degrees of fault, as both the Service and the Union were found to have acted in 'reckless and callous disregard of [Bowen's] rights'." *Id.*

Said footnote not only obviated much of the dissent in *Bowen* but eliminates said decision altogether as any kind of polestar for the sweeping and exclusive rule of law that petitioner seeks now. In *Bowen*, the court simply did not say that a grievance hearing date is *ipso facto* the damage cut-off point for the employer in all cases. After *Bowen*, the courts of appeals were certainly free to use such a factor or to assess degrees of fault in some other fashion, or in some combined fashion, based upon the realities of a given case.

This is precisely why the court of appeals in the instant case wrote, in citing *Aguinaga, supra*, that apportionment of damages premised upon the grievance hearing date "is not required in every hybrid case . . . ." App. A. at 27a.

Indeed, such a rule cutting off an employer's damages *ipso facto* because of the occurrence of a grievance hearing flies in the face of common sense, fairness and traditional notions of causation. It would be like absolving a drunk driver of responsibility for the suffering and ensuing death of the pedestrian he hit with his car solely because the ambulance got there late.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

ABF FREIGHT SYSTEM, INC.,
Petitioner

v.

RICK WEBB

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

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ABF FREIGHT SYSTEM, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

As the petition in this case explained, ABF Freight System, Inc. ("ABF") seeks review in this Court because the apportionment of damages in the courts below departs from the standards established in previous decisions of this Court and conflicts with the approach followed by other federal courts of appeals. Respondent barely acknowledges the authorities cited in the petition, dismissing them all with the categorical and unsupported assertion that they are "evidence-specific and fact-limited." (Br. in Opp. 25.) Instead of addressing the legal issues for which review is sought, respondent presents a peculiar amalgam of procedural, factual, and policy arguments that allegedly militate against review. All of these diversionary tactics fail.

1. The first question presented by ABF's petition was properly preserved in the courts below. Respondent first argues (Br. in Opp. 5-7, 15-16) that review should be denied because ABF seeks a rule of law that it did not request in the district court. In particular, according to respondent, ABF did not ask the trial court to rule that damages should be apportioned between the employer and Teamsters Local 17 ("the Union" or "Local 17") based on the date of the grievance committee's decision that sustained respondent's discharge. That is not correct. ABF requested that ruling, in writing, on at least two occasions—first, in its November 1994 motion for summary judgment (ABF App. 52) ("*ABF's back pay liability ends no later than August 10, 1993, the date of the JWAC hearing which upheld Webb's discharge*"), and, second, in its August 1996 motion for judgment as a matter of law or for a new trial (ABF App. 145) ("damages that accrued after the August 10, 1993 JWAC proceeding must be charged, as a matter of law, to the union, and not to ABF").[1] The court of appeals explicitly acknowledged and addressed ABF's argument on this point, as respondent himself admits. (Br. in Opp. 14.) *See, e.g.*, Pet. App. 10a-11a ("ABF argues that Webb was not entitled to an award of back pay from ABF for the period after the grievance arbitration hearings"), 26a ("ABF argues that its damages should have been capped as a matter of law to those wages that Webb lost prior to the grievance proceedings and that the district court erred in giving the jury its proportionate fault instruction"). Respondent never contended before the court of appeals that the point had not been adequately preserved in the district court. There is no basis, therefore, for respondent's assertion that ABF did not ask the trial court for

[1] "ABF App." refers to the Appendix to ABF's brief in the court of appeals.

the legal ruling that ABF now seeks in this Court through the first question presented in the petition.[2]

2. Respondent's attempt now to allege collusion between ABF and the Union is both improper and unsupported. In the petition, ABF recognized that, where an employer and a union collude with each other in breaching a collective bargaining agreement and denying an employee the effective processing of a grievance, several courts have not apportioned damages at all, but instead have held the union and employer jointly and severally liable. (Pet. 22 n.8.) Prompted by that acknowledgment, respondent now attempts to assert that this is a case involving collusion between ABF and the Union. The argument is flawed in several ways.

First, respondent pursued no such legal theory in the courts below. Respondent never sought joint and several liability against ABF and the Union. To the contrary,

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[2] Respondent is correct that ABF did not request—after the district court already had rejected the position set forth in ABF's summary judgment motion—a separate jury instruction requiring the jury to cut off damages as of the date of the grievance proceeding. The district court already had refused such a ruling, and there would have been no point in requesting an instruction contrary to the district court's decision on the summary judgment motion. Mistakenly, the petition overlooked the district court's summary judgment ruling and stated that ABF asked for such an instruction. Pet. 5. We regret the error. As the court of appeals' decision demonstrates, however, there is no question that the legal point was preserved in the district court.

Respondent's repeated references to an allegedly "lost or withdrawn" instruction No. 7 (Br. in Opp. 5, 8, 13) are misguided. There is no such separate instruction; the instruction referred to as No. 7 was the same instruction that is set forth in the appendix to the petition and referred to as Instruction No. 36. Pet. App. 37a. The numbering of the various proposed instructions changed as the district court considered the parties' proposals and put together the actual set of instructions to be given to the jury.

respondent endorsed (and continues to endorse) the district court's instruction regarding apportionment of liability between ABF and the Union. Implicit in that position is a recognition that joint and several liability is not appropriate in this case. That recognition is supported by respondent's own recitation of all of the Union's many failings in pursuing respondent's grievance. (Br. in Opp. 12, 17). Having failed to seek joint and several liability in the courts below, respondent is precluded from raising such a claim for the first time here.

Moreover, although respondent now claims that there was evidence of collusion regarding "all aspects of the grievance process" in this case (Br. in Opp. 17), respondent fails to identify any such evidence. That is hardly surprising, since there was none. The only item that respondent mentions from the record is an isolated statement by the trial judge near the close of respondent's evidence. The excerpt from the trial court's remarks reproduced by respondent (Br. in Opp. 4) is incomplete and taken out of context, and it in no way supports respondent's hastily constructed assertion of collusion between ABF and the Union.

The trial court's statement did not concern joint and several liability but rather whether the court would permit the jury to consider whether ABF acted "outrageously" so that respondent could claim special damages for emotional distress based on alleged extreme misconduct. It was in that context that the court made the following statement:

> If, indeed, the plaintiff's evidence is to be believed—if the jury believes it—that evidence was fabricated in this case; that there was some sort of agreements and plans between the union and employer—there has been some showing of that with the weekend

> work; that there was a statement afterwards that he would never work at another trucking company, all of those are sufficient for a showing of exceptional circumstances which would give rise to these special damages, extreme and outrageous misconduct.
>
> If this were a discharge case and there were a claim for outrageous, I would allow that to go to the jury with this evidence under state law, if this were a diversity case.
>
> So the evidence may come in; and the jury, not the Court, will decide whether this is the type of a case where—where the employer was acting outrageously. That's a factual issue. All I'm ruling is that there is enough evidence to go to the jury. I understand it's going to be rebutted, we're going to hear other evidence; but the jury is the fact-finder here, so the evidence may come in on emotional damages—I hope very briefly, Mr. Olsen.

Tr. 614 (July 11, 1996). Respondent did not claim, and neither the district court nor the jury found, collusion between ABF and the Union in connection with Webb's discharge and the Union's handling of his grievance. Indeed, as the court of appeals observed, the jury rejected even Webb's claim of "extreme" misconduct by ABF and declined therefore to award any damages on Webb's claim of emotional distress. Pet. App. 9a.[3]

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[3] As a review of the district court's statement shows, the only alleged "evidence of collusion" offered by respondent concerned the resolution of a grievance over the allocation of weekend work assignments, not respondent's discharge. Pet. App. 3a. Although the jury rejected this evidence as the basis for any claim of special damages, the evidence undoubtedly suggested to the jury a possible political motive for Local 17's bad-faith handling of respondent's discharge grievance.

3. Respondent's repeated references to "fabricated physical evidence" have nothing to do with the questions presented for review. In still another diversionary tactic, respondent repeatedly accuses ABF of submitting fabricated evidence in the grievance proceeding. Apart from the fact that such accusations are untrue, they are irrelevant to the questions presented for review. The issue in this case is the legal standard governing the apportionment of liability between an employer and a union in a "hybrid" Section 301/duty of fair representation case. In such a case, the employer's alleged wrongdoing is an unlawful discharge or other disciplinary action allegedly in violation of the governing collective bargaining agreement. The basis for the claim against the employer is the employer's job-related action against the employee, not the employer's conduct in defending against a subsequent grievance. Obviously, to the extent that an employee believes that evidence presented in a grievance proceeding has been fabricated, the employee and the employee's bargaining representative can and should bring his views to the attention of the grievance committee or the arbitrators, and the issue can be addressed at that time.[4] Such an assertion does not, however, affect the appropriate resolution of the legal issues presented in the petition.

4. Respondents characterization of ABF as the "primary wrongdoer" begs the question to be decided. It is a necessary part of respondent's case that, if the Union had not breached its duty to represent him fairly, he would have been reinstated as a result of the grievance proceed-

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[4] Indeed, it was Local 17's failure adequately to present respondent's view of the evidence—possibly for reasons relating to an internal Union political dispute—that led in part to respondent's claim of a breach of the duty of fair representation. *See* Pet. App. 6a, 15a-18a.

ing, and almost all of the damages awarded by the jury never would have been incurred.[5] As a result of the Union's breach of its duty, the grievance proceeding malfunctioned, and ABF now has been assessed back pay damages some 70 times greater than the total damages that would have been incurred in the absence of the Union's breach.

Nonetheless, respondent seeks to avoid review by characterizing ABF as the "primary wrongdoer." Respondent does not define this term. His contention appears to turn exclusively on the chronological truism that an employer's termination of an employee precedes a union's breach of its duty to fairly represent the employee in the ensuing grievance process. But if this truism is the controlling factor in determining the apportionment of damages, then this Court's decisions in *Vaca* and *Bowen* are meaningless. *See Vaca v. Sipes,* 386 U.S. 171 (1967); *Bowen v. United States Postal Service,* 459 U.S. 212 (1983). Under respondent's theory, the employer always would be primarily responsible for back pay damages, and case-by-case allocation would not be necessary. Both *Vaca* and *Bowen,* however, require the allocation of back-pay damages between the union and the employer "according to the damage caused by the fault of each." *Vaca,* 386 U.S. at 197. The rule proposed by ABF would ensure that this mandate is fulfilled. *See, e.g., Camacho v.*

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[5] As explained in the petition (Pet. 18), if the Union had represented respondent fairly and respondent still was not reinstated through the grievance procedure, that outcome would have been final, and respondent would not have been permitted to pursue any claim against ABF in court. Respondent cannot be better off in his claim against ABF if the Union breached its duty of fair representation than if no such breach had occurred. Accordingly, unless respondent could demonstrate that he would have been reinstated in the absence of the Union's breach, he would have had no claim against ABF.

Ritz-Carlton Water Tower, 786 F.2d 242, 245 (7th Cir.) ("The employer is liable for any damages preceding the time an arbitrator would have reinstated the employee, had the union done its duty."), *cert. denied*, 477 U.S. 908 (1986). Respondent's position, on the other hand, ensures that unions can freely breach their duty of fair representation, in the knowledge that the employer will be forced to pay most, if not all, of the damages attributable to that breach. Such a result would seriously undermine the entire grievance process and the ability of collective bargaining parties to rely on private means of resolving their disputes. *See, e.g., Bowen*, 459 U.S. at 227 (describing grievance procedure as "a procedure that contemplates that both employer and union will perform their respective obligations").

5. None of respondent's efforts to defend the district court's instructions to the jury can avoid the need for review in this case. In a further effort to defeat review, respondent makes a series of arguments concerning the district court's instructions, all of which fail to address the legal issue raised by ABF. Respondent argues:

(i) that the district court's instruction on the apportionment of damages was broad enough to permit the jury to consider, as one relevant factor, the date of the hearing before the grievance committee in San Diego;

(ii) that the instruction requested by ABF would have improperly highlighted only one item of evidence at the trial; and

(iii) that the district court's instruction on apportionment somehow "embodied the very concept" that ABF sought to convey in the instruction that the district court rejected.

All of these arguments miss the point. Unless the district court either limited ABF's potential damages as a matter

of law to the amount of back pay owed at the completion of the grievance proceeding or at least instructed the jury that it should consider that date as a significant factor in the apportionment decision, the apportionment would be performed, as it was in this case, without any standards at all and without any recognition of the enormous disparity between the amount of damages that would have been incurred had the Union performed its duty and the amount that actually was incurred as a consequence of the Union's failure to do so.

Nothing in the instruction actually given by the district court provided the jury with any guidance on this point or "embodied the concept" underlying ABF's position. Respondent's suggestion that the date of the grievance proceeding is just one factor that the jury can consider, similar in this regard to the thickness of the branch that Webb hit with his truck, assumes that the jury should apportion damages by making an ad hoc judgment about how "bad" the conduct of the employer and the Union was, according to some abstract standard not explained by the court and left to the jury to devise in each case on whatever basis it sees fit. That is not the sort of apportionment that is contemplated by this Court's decisions and the decisions of other circuits cited in the petition. In short, nothing in the brief in opposition obviates the need for intervention by this Court to establish the appropriate guidelines for dividing liability between the Union and the employer in hybrid Section 301/DFR actions like this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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